TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, ETC., ET AL.,
PETITIONERS,

vs.

PANAMA STEAMSHIP COMPANY, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1959
CERTIORARI GRANTED NOVEMBER 16, 1959

No. 15637

United States
Court of Appeals
for the Ninth Circuit

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS, Appellants,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al., Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

VANCE & PETERSON,
J. DUANE VANCE,
IVER PETERSON,

230 Sixth Avenue North,
Seattle 9, Washington

Attorneys for Appellants.

SUMMERS, BUCEY & HOWARD,
CHARLES B. HOWARD,
LANE SUMMERS,
JOHN D. MOSSER,

840 Central Building,
Seattle 4, Washington

Attorneys for Appellees.

In The United States District Court, Western District of Washington, Southern Division

Civil No. 2168

PANAMA STEAMSHIP CO., LTD., a corporation, SEATANKERS, INC., a corporation, and SOCRATES PALEOCRASSAS, an individual, Plaintiffs,

vs.

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE FOUR, individual members of above voluntary association; SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, a voluntary association, PAUL HALL, JAMES DOE ONE, JAMES DOE TWO, JAMES DOE THREE and JAMES DOE FOUR, individual members of above association; INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, a voluntary association, and JOE DOE ONE, JOE DOE TWO, JOE DOE THREE, individual members of the association; INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, Local 19, and ROBERT DOE ONE, ROBERT DOE TWO, ROBERT DOE THREE AND ROBERT DOE FOUR, individual members of above voluntary association; SAILORS UNION OF THE PACIFIC, a voluntary association and RALPH DOE ONE, RALPH DOE TWO, RALPH DOE THREE AND RALPH DOE FOUR, individual members of the above voluntary association; INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INC., a corporation and WILLIAM DOE ONE, WILLIAM DOE TWO AND WILLIAM DOE THREE, individual members of the above corporation; INLAND BOATMEN'S UNION OF PACIFIC, a voluntary association, JOHN M. FOX, FRANK DOE ONE, FRANK DOE TWO, FRANK DOE THREE, individual members of the above voluntary association; MARINE FIREMEN, OILERS, WATERTENDERS & WIPERS ASS'N. OF PACIFIC COAST, a voluntary association, TOM DOE ONE, TOM DOE TWO, TOM DOE THREE, individual members of above voluntary association; and ED DOE ONE, ED DOE TWO, ED DOE THREE, ED DOE FOUR, ED DOE FIVE, Defendants.

COMPLAINT

Plaintiffs above named and each of them for their complaint seeking injunctive relief and compensatory damages against the defendants above named and each of them allege:

I.

That the plaintiff Panama Steamship Co., Ltd., at all times material was and now is a foreign corporation and the owner of the Steamship "Nikolos";

II.

That the plaintiff Seatankers, Inc., at all times material was and now is a foreign corporation and charterer of the Steamship "Nikolos";

III.

That the plaintiff Socrates Paleocrassas at all times material was and now is an individual and the Master of the Steamship "Nikolos";

IV.

That excepting only the individual defendants above named, all defendants are either corporations or associations existing and acting as unions of organized labor. That the defendant James O. Willoughby, at all times material was and now is representative of the defendant Marine Cooks & Stewards, AFL, acting locally in behalf of that defendant and all other defendants. That the defendant Paul Hall, at all times material was and now is the controlling executive representative of

the defendant Seafarer's International Union of North America, acting in New York City in behalf of said defendant and all other defendants.

V.

That the Steamship "Nikolos" at all times material was and now is a foreign merchant vessel of Liberian registry (Official No. 396) presently having aboard a full cargo of some 8,570 long tons of bulk salt loaded at the port of Black Warrior Lagoon on the Pacific West Coast of Mexico for transportation to the Port of Tacoma in the State of Washington there to be discharged at a safe berth for delivery to the consignee Hooker Electro-Chemical Company, all pursuant to charter and affreightment contract as effective during the current voyage.

VI.

That the Master, Officers, and Crew of said Steamship are all aliens, none being a citizen of the United States. That such Officers and Crew are serving aboard said Steamship under Articles of Employment subject to the laws of the Republic of Liberia. That between the plaintiffs and said personnel aboard said Steamship neither strike nor labor dispute of any sort has existed at any time material, and that none such exists at the present time.

VII.

That with the assistance of a licensed Puget Sound Pilot said Steamship arrived in the harbor of the Port of Tacoma at 01:50 hours on the 10th

of June, 1957, when and where said Steamship was prevented from proceeding to consignee's intended berth for discharge and delivery of said cargo by the vessel "Will-O-Bee" which was displaying a sign reading "Picket Boat" and which was acting as such for the defendant Marine Cooks & Stewards, AFL, in behalf of all defendants.

That boarding said Steamship from said picket boat, the defendant James O. Willoughby, speaking in behalf of the defendant Marine Cooks & Stewards, AFL, and in the interest of all defendants notified the Master of said Steamship that it was being picketed by the defendants in protest of its current voyage, the same being characterized as a "coastwise voyage." That further the defendant James O. Willoughby then warned the Master that such picketing would be maintained as necessary to prevent said Steamship from proceeding to berth and to prevent its said cargo from being discharged and delivered, for which purpose a picket line would be established ashore as necessary, which same would be honored by all longshoremen and all other labor directly or indirectly involved.

VIII.

That promptly after so arriving in the harbor at the Port of Tacoma said Steamship became lawfully entitled to discharge and deliver said cargo at the consignee's intended berth by having been officially cleared and passed by all United States Immigration, Quarantine and Customs authorities. That said Steamship now continues entitled so to do.

IX.

That due solely to the continued maintenance in the vicinity of said Steamship of the vessel "Will-O-Bee" as a picket boat, said Steamship has been deprived of the required assistance of both said Puget Sound Pilot and the usual tug, the same being necessary to reach the consignee's intended berth, and also said Steamship has been compelled to remain in said harbor at anchor until the present time.

That since said Steamship so arrived in the harbor at the Port of Tacoma earnest repeated efforts for the plaintiffs, through their representatives, in treating with the defendant unions have wholly failed to induce them or any of them to discontinue said picketing or to permit said Steamship to proceed with performance of obligations to said consignee.

That, such efforts with the defendants proving obviously futile in an attempt to complete the current voyage orders on the 12th of June, 1957, were issued in behalf of said Steamship for the services of a licensed Puget Sound pilot and a competent tug to render assistance enabling said Steamship to be secured at consignee's intended berth; but that on account of such picketing as above described and under the influences exerted by the defendants, said assistance of such pilot and such tug then were and still are withheld from the plaintiffs.

X.

That an actual bona fide labor dispute of any

sort, at all times material has been and now is, non-existent as between the plaintiffs and the personnel in service aboard said Steamship which is operating upon the current voyage in violation of no commitment with the defendants or any of them.

XI.

That both the independent and concerted actions of the defendants in continued operation of the vessel "Will-O-Bee" as a picket boat together with additional and different actions by the defendants including their inducements to or their threats against other labor organizations resulting in a united front of all necessary labor effectively frustrating the plaintiffs in the completion of the current voyage of said Steamship is an unlawful and coercive conspiracy which violates the plaintiffs' maritime contractual rights in legitimate foreign commerce entitling plaintiffs to immediate and permanent injunctive relief.

That in effect by such actions the defendants have established and threaten to maintain an unlawful secondary boycott against the consignee Hooker Electrochemical Company, a New York corporation, as related to its manufacturing plant at the Port of Tacoma in the State of Washington. That by such boycott, said consignee is being obstructed in its right to the lawful importation of the cargo aboard the vessel.

XII.

That as the direct result of such unlawful conduct by the defendants in cooperating together and in

influencing other unions controlling essential labor, the plaintiffs have already sustained damages reasonably estimated at the sum of $100,000.00, the amount of which is to be determined by proof submitted during the trial on the merits.

That as the direct and indirect results of such wrongful conduct by the defendants, if the same be continued, the plaintiffs will hereafter suffer aggravated and irreparable damages in an undeterminable and unrecoverable amount.

Wherefore, the plaintiffs pray for relief and remedy as follows:

1. Upon final judgment in this action, permanent injunction prohibiting and enjoining all defendant individuals and all defendant unions of organized labor, whether corporations or associations, together with each and all of their members, officers, representatives, agents, employees and all others heretofore or hereafter acting in behalf of or in concert with said defendants or any of them, from directly or directly by picketing or by any other means at any time or in any manner, preventing, obstructing or delaying the arrival of said Steamship "Nikolos" at the consignee's intended berth, the discharge of said cargo from said Steamship or the delivery of said cargo to such consignee; and also from directly or indirectly interfering in any degree with full, faithful performance of such affreightment contract by which said Steamship is obligated to such consignee.

2. During the pendency of this action, a tempo-

rary injunction likewise prohibiting and enjoining all such defendants, and each of them, together with all such others above mentioned acting heretofore or hereafter as above specified.

3. Forthwith, upon presentation of this complaint with supporting affidavits, a temporary restraining order likewise prohibiting and enjoining all such defendants, and each of them, together with all such others above mentioned acting heretofore or hereafter as above specified.

4. By final judgment in this action, an award in favor of plaintiffs against defendants for the amount of plaintiffs' damages as established by proofs at the trial.

5. Such additional or different relief or remedy to which the plaintiffs may be entitled during the pendency hereof or at the conclusion hereof.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
/s/ CHARLES B. HOWARD,
Attorneys for Plaintiffs above named.

Duly Verified.

United States of America,
State of Washington,
County of King—ss.

Alvin E. Schultze, being first duly sworn, on oath deposes and says:

That he is employed as Assistant Operating Man-

ager of National Bulk Carriers, Inc., and Affiliates. That Seatankers, Inc., one of the plaintiffs in this action is a subsidiary of National Bulk Carriers, Inc., and is the sub-time charterer of the SS Nikolos from North Atlantic and Gulf Steamship Co., Inc., the primary time charterer of the SS Nikolos. That Transea Carriers, Inc., an affiliate or subsidiary of National Bulk Carriers has a contract of affreightment with Hooker Electro-Chemical Co. of Tacoma for transportation of a full cargo of approximately 8,570 long tons of bulk salt aboard the SS Nikolos from Black Warrior Lagoon, Mexico to Tacoma, Washington, for delivery to and discharge at the terminal dock of Hooker Electro-Chemical Co. That affiant has been at Tacoma, Washington during the last few days to represent Seatankers, Inc. and Transea Carriers, Inc., in connection with the arrival of said vessel and the intended discharge of its cargo of bulk salt. By the terms of the charter, Seatankers, Inc., is obliged to provide pilotage and tug assistance as required to enable the vessel to proceed to its intended berth at Hooker Electro-Chemical Co. dock at Tacoma.

At the request of affiant, C. R. Swenson of J. T. Steeb & Co., Inc., agents and customs brokers did, at 0150 hours on June 10, 1957 make verbal tender of the SS Nikolos to Hooker Electro-Chemical Company, upon arrival of the vessel in Tacoma Harbor. Thereafter this verbal tender was confirmed by the aforesaid agents and brokers, after receipt of notification from the Shift Superintendent of Hooker Electro-Chemical as follows:

"Because the ship cannot unload its salt cargo and perform in accordance with our contract with Transea Carriers we cannot provide moorage at our dock."

Affiant is informed and believes that on June 10, 1957, and subsequently, the SS Nikolos has at all times been prepared and capable of moving from Tacoma Harbor to berth at Hooker Electro-Chemical Company, being prevented from doing so solely because of activities of a so-called picket boat circling around and near the vessel while at anchorage and the apprehension and fear of officials of Hooker Electro-Chemical Company that if the vessel berths at its plant, a picket line will be set up by one or more of the defendants hereinabove named, which would be honored by plant employees of Hooker Electro-Chemical Company, or employees of independent contractors, thus causing a total or partial shutdown of its operations, although said company is not involved in any strike or labor dispute.

That on June 11 and on June 12 affiant made further efforts to arrange for removal of the so-called picket boat and for assurances that no picket line would be established at the Hooker Electro-Chemical Company plant in the event that the SS Nikolos proceeded to berth thereat. That such efforts have been unsuccessful and, affiant is now informed that local representatives of longshoremen's unions at Tacoma and/or Seattle have indicated to employer representatives that longshoremen will refuse to work in discharging cargo from the SS Nikolos at Tacoma, until instructed to the

contrary by officials of the international unions involved, whether a picket line is maintained or in respect to a so-called "invisible picket line."

/s/ ALVIN E. SCHULTZE

Subscribed and sworn to before me this 12th day of June, 1957.

[Seal] /s/ CHARLES B. HOWARD,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
State of Washington,
County of King—ss.

Socrates Paleocrassas, being first duly sworn, on oath deposes and says:

That I am a citizen of Greece and am now and for over 3 years last past have been the master of the SS Nikolos. That said vessel is owned by Panama Steamship Co., Ltd., a corporation, and is registered and operated under the Liberian flag.

That none of the officers or members of the crew of the SS Nikolos are United States citizens, said crew being composed almost entirely of Greek nationals, except for two crew members of Egyptian nationality, two crew members of Portuguese nationality and one British wireless operator. That all of said officers and crew members have heretofore signed Articles of Shipment prepared under the laws of the Republic of Liberia and opened at Cardiff, Wales, on May 24, 1954, which said Articles

are effective and controlling as to employment since the voyage or voyages contemplated thereby have not been terminated to date.

That the owners and operators of the SS Nikolos are parties to a labor agreement with the Panhellenic Maritime Federation of Greece and its branch unions representing the various categories of officers, engineers and unlicensed members of the crew. That affiant has been and now is paying wages to said officers and crew members of the SS Nikolos equal to or in excess of the amounts specified under the aforesaid Greek labor agreement with the Panhellenic Maritime Federation.

That at this time, and for many months in the immediate past, all officers and crew members on the SS Nikolos have been contented in their employment and there has been and is not now any labor dispute, strike, or labor discontent among the officers and crew members or between them and affiant as master, or with the owner and operators of said vessel.

That upon arrival of the SS Nikolos at Tacoma Harbor on the early morning of June 10, 1957, the SS Nikolos was in all respects seaworthy and capable of proceeding to berth at the Hooker Electrochemical Company dock for the purpose of discharging a full cargo of bulk salt then aboard, which had been loaded aboard at Black Warrior Lagoon, Mexico, before departure from that port for Tacoma on June, 1957.

That since arrival of the SS Nikolos at Tacoma

on June 10, 1957 said vessel has at all times been ready to proceed to discharging berth, being prevented from doing so by reason of lack of tug assistance and pilotage, which was requested on June 12, 1957 but was not then, or since, supplied.

That commencing on the morning of June 10, 1957, a small cabin cruiser bearing the name Will-O-Bee has been more or less constantly present in the vicinity of the SS Nikolos at its position of anchorage in Tacoma Harbor. Said small boat bears one or more signs upon which appear the words "Picket Boat". That on the morning of June 10, 1957, at approximately 0900 hours one James O. Willoughby boarded the SS Nikolos from said small boat. Mr. Willoughby identified himself as a business agent for the Marine Cooks & Stewards, AFL. He indicated that upon instructions from the international headquarters for his union at New York City local members of the Marine Cooks & Stewards Union were undertaking to prevent the docking and discharge of the SS Nikolos. Affiant can state that no members of the crew of the SS Nikolos are members of the Marine Cooks & Stewards, AFL, or in any manner affiliated with said union. Affiant further states that since the SS Nikolos is operating under Liberian flag, and crew members are parties to an agreement with the shipowner through the Panhellenic Maritime Federation, that American unions such as the Marine Cooks & Stewards, AFL, and other unions named as defendants in this cause, would have no jurisdiction over the crew members and labor agreements

entered into by or upon behalf of the crew members of the SS Nikolos.

/s/ SOCRATES PALEOCRASSAS.

Subscribed and sworn to before me this 12th day of June, 1957.

[Seal] CHARLES B. HOWARD,
Notary Public in and for the State of Washington,
residing at Seattle.

United States of America,
State of Washington,
County of Pierce—ss.

Carl R. Swenson, being first duly sworn, deposes and says:

That he is a resident of Tacoma, Washington and manager of the Tacoma office of J. T. Steeb & Co., Inc. That said company is acting as agents and customs brokers for Seatankers Inc. and Transea Carriers, Inc. at Tacoma in connection with the arrival and discharging of the SS Nikolos.

That upon arrival of the SS Nikolos in Tacoma Harbor at 0150 hours on June 10, 1957, pursuant to instructions from Mr. Alvin E. Schultze of Seatankers, Inc., representing Transea Carriers, Inc., affiant verbally tendered the SS Nikolos to Hooker Electrochemical Company in accordance with the Contract of Affreightment. Shortly thereafter, the Shift Superintendent for Hooker Electrochemical Company replied with the following message:

"Because the ship cannot unload its salt cargo

and perform in accordance with our contract with Transea Carriers we cannot provide moorage at our dock."

Said exchange of message was confirmed in writing by affiant later on June 10, 1957.

That prior to 0900 hours on 10 June, 1957 affiant had secured all necessary customs clearance and the ship had already been cleared as required for immigration and quarantine purposes at San Pedro, California. That affiant is informed and believes that the ship was at all times capable and ready to proceed to berth at Hooker Electrochemical Company at Tacoma, being unable to do so solely because of the presence of a small boat carrying the name Will-O-Bee in and near the vicinity of the SS Nikolos in Tacoma Harbor, which affiant personally observed at about 0600 hours on 10 June, 1957, which boat carried one or more signs containing the words "Picket Boat". That affiant is informed and believes that said boat has been more or less constantly present about and near the SS Nikolos while at anchor in Tacoma Harbor.

Affiant is further informed and believes that Hooker Electrochemical Company have based their refusal to provide a berth or moorage for the SS Nikolos upon the fear of shutdown which might result at their Tacoma plant if a so-called picket line, as affiant understands has been threatened, is set up around the plant after arrival and berthing of the SS Nikolos for purpose of discharging its cargo.

That during June 10, 11 and 12 affiant in cooperation with Mr. Schultze has continued with diligent

efforts to arrange for berthing of the SS Nikolos and/or removal of the picket boat and threat of shore picket line. That in cooperation with Mr. Schultze, affiant did on the afternoon of June 12, 1957 request Foss Launch & Tug Co. to provide tug assistance, and Puget Sound Pilots to provide a licensed Puget Sound Pilot for the purpose of moving the SS Nikolos from anchorage in Tacoma Harbor to berth at the Hooker Electrochemical Company dock at Tacoma, said move having been scheduled for approximately 5:00 P.M. on June 12, 1957. Arrangements were likewise made for 2 gangs of longshoremen to be called for discharge work commencing at 7:00 P.M. on June 12 and 3 gangs to be called for work on the morning of June 13, 1957. That around 5:00 P.M. on June 12, 1957 affiant and Mr. Schultze were notified that the Foss Launch & Tug Co. would be unable to provide tug assistance to the SS Nikolos because defendant John M. Fox representing defendant Inland Boatman's Union of the Pacific had advised the tugboat company that the SS Nikolos was regarded as a "hot ship". Because of the refusal of tug assistance the pilot was unable to proceed with the requested movement of the ship and it will be impossible to use the gangs of longshoremen who have been ordered and dispatched for intended discharging operations on the evening of June 12 and the morning of June 13, 1957.

That when affiant was aboard the SS Nikolos between 0600 and 0930 hours on June 10, 1957 one James O. Willoughby came aboard the SS Nikolos

from the so-called picket boat, identifying himself as a business agent for the Marine Cooks & Stewards, AFL. Said Willoughby examined the copy of labor agreement produced by the master, between the shipowners and certain Greek labor union groups. Affiant was given to understand by Mr. Willoughby that the so-called picket boat and other coercive action was being taken by the Marine Cooks & Stewards, AFL ostensibly on the basis that this vessel was in a so-called coastal trading operation between the west coast of Mexico and U. S. Pacific Coast Ports (Tacoma). That affiant had been notified by said J. O. Willoughby that the vessel would be picketed upon arrival if its crew was not organized in unions recognized by the International Transport Federation.

As of late afternoon of June 12, 1957, affiant personally observed that the so-called picket boat Will-O-Bee was still present in the vicinity of the SS Nikolos at anchor in Tacoma Harbor.

/s/ CARL R. SWENSON.

Subscribed and sworn to before me this 13th day of June, 1957.

/s/ CHARLES B. HOWARD,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed June 13, 1957.

[Title of District Court and Cause.]

SUMMONS

To the Defendants Above Named:

You and each of you are hereby summoned and required to serve upon Summers, Bucey & Howard, plaintiffs' attorneys, whose address is suite 840 Central Building, Seattle 4, Washington, an answer to the complaint, which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so judgment by default will be taken against you for the relief demanded in the complaint.

Dated this 14th day of June, 1957, at Tacoma, Washington.

[Seal] MILLARD P. THOMAS,
Clerk,

/s/ By ROSEMARY D. FREENY,
Deputy Clerk.

[Title of District Court and Cause.]

RETURN ON SERVICE OF WRIT

United States of America,
Western District of Washington—ss.

I hereby certify and return that I served the annexed Summons, Complaint, and Order to Show Cause for Preliminary Injunction on the thereinnamed James O. Willoughby by handing to and

leaving two true and correct copies thereof with him personally, one service as an individual and one as Business Agent of the Marine Cooks & Stewards, AFL at 2:10 P.M. at 605 Alexander, Tacoma, Washington, in said District on the 14th day of June, 1957. Service $8.00.

W. B. PARSONS,
U. S. Marshal,

/s/ By RICHARD S. OSBORN,
Deputy.

AMENDED RETURN ON SERVICE OF WRIT

United States of America,
Western District of Washington—ss.

I hereby certify and return that I served the annexed Summons, Complaint and Order to Show Cause for Preliminary Injunction on the thereinnamed Marine Cooks & Stewards, AFL by handing to and leaving a true and correct copy thereof with both Virgil Rogers, John Doe I and Willard Richards, John Doe II, each being a member of the above association, while they were aboard the picket boat "Will-O-Bee", moored at 605 Alexander Avenue personally at 11:45 A.M. in said District on the 14th day of June, 1957.

W. B. PARSONS,
U. S. Marshal,

/s/ By RICHARD S. OSBORN,
Deputy.

Marshal's costs:

Service	8.00
Mileage	1.40
	9.40

[Endorsed]: Returns Filed June 28, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION

The above entitled action having come before the above entitled court, the undersigned Judge presiding, upon motion of the plaintiffs above named for order to show cause why the defendants above named should not be subjected to temporary injunction restraining them as sought by the plaintiffs, and it appearing to the court from the verified complaint of the plaintiffs together with affidavits in support thereof that such motion should be granted;

Now, Therefore, It Is Hereby Ordered, as follows:

1. That the defendants above named and each of them are directed and required to be and appear before the above entitled court, the undersigned Judge presiding, in the Federal Building at Tacoma, Washington on the 15th day of June, 1957, at the hour of 10:00 o'clock A.M. or as soon thereafter as hearing may be had, there and then to show cause why they and each of them should not be sub-

jected forthwith to temporary restraining order enjoining them and each of them as prayed by the plaintiffs' verified complaint or as otherwise directed and required by said court.

2. That certified copy of this order, together with copy of summons, copy of said verified complaint, and copy of said affidavits be supplied forthwith to the United States Marshal for the earliest possible service upon said defendants and each of them who may be found for such service not later than 5:00 P.M. on the 14th day of June, 1957.

3. That the United States Marshal is directed and required to exercise the most diligent effort in effecting earliest possible service upon said defendants and each of them.

Done in Open Court this 14th day of June, 1957.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by

/s/ CHARLES B. HOWARD,
Of Summers, Bucey & Howard,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

AFFIDAVIT AND RESPONSE TO ORDER TO SHOW CAUSE

James O. Willoughby, being first duly sworn on his oath, deposes and says:

He is one of the defendants above named and is Seattle agent of Marine Cooks & Stewards, AFL, herein called MCS, a voluntary association commonly known as a labor union, and makes this affidavit in response to the Order to Show Cause heretofore made and issued herein on the 14th day of June, 1957.

Marine Cooks & Stewards, AFL, is an autonomous national local union affiliated with the Seafarers International Union of North America and has its headquarters in San Francisco, California and maintains a branch office in Seattle, Washington. Your affiant is, as above stated, the agent of said organization at its offices in Seattle, Washington.

Marine Cooks & Stewards, AFL, is a labor organization comprised of a membership of approximately 5,000 members who are employed in the steward's department of vessels primarily plying the Pacific Coast trade. Said labor organization, the Sailors Union of the Pacific, another autonomous affiliate of the Seafarers International Union of North America, and the Marine Firemen, Oilers, Water Tenders & Wipers Association, another au-

tonomous affiliate of the Seafarers International Union of North America, organized as the Pacific District of said International Union, have been certified by the National Labor Relations Board as the collective bargaining agent for all unlicensed personnel, including steward's department personnel, on all vessels operated by the employer members of the Pacific Maritime Association and the Pacific Shipowners Association, comprising approximately 90 per cent of the vessels flying the American flag plying the Pacific Ocean in merchant and maritime commerce.

Pursuant to said certification, the Marine Cooks & Stewards, AFL, has entered into contracts with said employer associations providing for minimum wages, hours, and working conditions, health and safety regulations, health and welfare payments, pension provisions, and so forth, as are usual and customary in collective bargaining today.

Affiant learned that the SS Nikolos was a foreign flag vessel and was about to embark upon a course of coastal shipping between Mexico and the United States, hauling salt, in competition with vessels operated by employers under the aforesaid contract or contracts with the MCS and its affiliates.

The affiant also learned that due to the procuring of said employment by the SS Nikolos, the SS Ira Nelson Morris, a vessel operated by a company affiliated with the Pacific Maritime Association, namely Coastwise Lines, and under contract to the MCS, lost said business and was tied up and rendered inactive in the Port of San Francisco and

laid off its crew, some of whom were members of MCS.

Affiant is unfamiliar with the intricate and involved corporate machinations of the alleged owners and/or operators of the SS Nikolos and is unable to affirm or deny, and therefore denies the allegations of the complaint and its supporting affidavits relative to the corporate status of the Panama SS Co., Ltd., the Seatankers, Inc., the North Atlantic and Gulf SS Co., Inc., and Transea Carriers, Inc., all of whom are referred to and alleged in the complaint and affidavits herein to have some part in the ownership or operation of the SS Nikolos.

Affiant states that the SS Nikolos is a Liberty ship built during the period of World War II as a war vessel and at the expense of the United States Government and was sold to one or the other of the numerous and intricate corporate entities referred to in the complaint and affidavits in support thereof.

After said sale the SS Nikolos was promptly registered under the foreign flag operation, thereby evading the wages, hours, and working conditions of American seamen. Not only did the foreign registry evade collective bargaining with American trade unions and the resultant maintenance of the wages, hours, and working conditions thereof, but also evaded the laws of the United States relating to the wages of seamen, the minimum safety requirements of ships, and the numerous other provisions of the Federal law applicable thereto.

In the operation of its vessel, the SS Nikolos, the

plaintiffs pay less than one-fifth of the customary and going wage rates in the Pacific area for American-flag vessels and do not maintain the minimum health, safety, and other protections guaranteed by the laws of the United States to merchant seamen.

On or about June 10th, 1957, in the morning, affiant was in the Tacoma Harbor in his personally owned vessel, the "Will-O-Bee", when the vessel, the SS Nikolos, was at anchor in said harbor. The affiant procured a sign saying "Picket Boat" and proceeded to peacefully navigate around the SS Nikolos. A tug boat came along side on the morning of June 10th, stayed a short while, and left. Thereafter, on Monday and Tuesday affiant continued to peacefully and sporadically encircle the SS Nikolos, his boat bearing said sign. Affiant at no time had more than two men plus himself on the picket boat and usually only one. Affiant did not engage in any violence or make any threats of harm or violence of any kind to any plaintiff or any of their representatives or employees or any other persons whatsoever in connection with this dispute. Affiant has received no order from any public officer whatsoever and has engaged in no conversation with any public officer or in any way indicated or stated or threatened that he would not comply with any order of any public officer made in the official course of said officer's duty.

That on or about Wednesday, June 12th, 1957, about 5:30 or 6:00 o'clock P.M., a tug boat came to the SS Nikolos and moved it about 500 yards to a

safer anchorage. At no time did affiant or any other person connected with this dispute, to your affiant's knowledge, attempt in any way to interfere with said movement of said vessel.

At no time has your affiant attempted to cause or induce any of the crew members of the SS Nikolos to leave said vessel or to cease performing their work, or to refuse to obey orders or made any other request of any form whatsoever of any crew member of the SS Nikolos concerning his relationship with his employer.

With reference to the statement made in the affidavit of Carl R. Swenson, attached to the complaint, regarding the International Transport Federation and in connection with the statements in the several affidavits as to affiant's relationship to the Seafarers International Union of North America, affiant states that he was informed by one Schultze, who verified the complant herein, that this entire matter had been cleared with Mr. Paul Hall, the President of the Seafarers International Union of North America, and that plaintiffs had convinced Mr. Hall that the vessel was and would be in compliance with the standards set up by the International Transport Federation. That the International Transport Federation is a worldwide organization of unions engaged in the transportation industry, and that one of the principles adopted by said organization is that where a vessel operates in a coastal operation, as does the SS Nikolos here, as

distinguished from a trans-ocean or world-trade operation, said vessel will comply with the wages, hours, and working conditions prevalent in the area in which it operates. That affiant checked with the office of Mr. Paul Hall and was told that no such contact had been made.

Affiant discussed this matter with Mr. Schultze, who verified the complaint herein, and with Mr. Swenson, whose affidavit is attached to the complaint, as the agents of one or more of the plaintiff companies, both of whom denied any authority to enter into negotiations leading to any understanding with your affiant which would in any way adjust the dispute between the MCS and one or more of the plaintiff corporations, and affiant has not been able to find or talk with any person or persons in this area or been referred to any person who could be contacted by long-distance who would admit to having the authority to negotiate and adjust the difference with affiant's organization.

/s/ JAMES O. WILLOUGHBY.

Subscribed and sworn to before me this 15th day of June, 1957.

[Seal] J. DUANE VANCE,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed June 15, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing before the undersigned Judge of the above entitled court at Tacoma, Washington on June 15 and continuing on June 17, 1957 upon an order to show cause why a preliminary restraining order or temporary injunction should not be issued against the defendants as prayed for in the verified complaint on file herein, plaintiffs appearing and being represented by their attorneys Summers, Buecy & Howard, Charles B. Howard and John D. Mosser of counsel, defendants Marine Cooks and Stewards, AFL, a voluntary association and James O. Willoughby, and Virgil Rogers and Willard Richards otherwise designated as John Doe One and John Doe Two respectively, individual members of the above voluntary association appearing and being represented by J. Duane Vance and Ivar Peterson, their attorneys, the International Organization of Masters, Mates and Pilots, Inc., a corporation, and George J. Decker and Delbert J. Kelley otherwise designated as William Doe One and William Doe Two respectively, individual members of the above corporation, appearing and being represented by their attorneys Levinson and Friedman, Sam Levinson of counsel, the International Brotherhood of Longshoremen, a voluntary association, and L. B. Connell otherwise designated as Joe Doe One, individual member of the above voluntary association

appearing and being represented by Jack E. Tanner, their attorney, and the other defendants not having been served and not being before the court; the court having considered the verified complaint, the affidavits filed in support of and opposition thereto, the oral testimony of witnesses produced on behalf of the plaintiffs and the defendants and having heard arguments of counsel and considered the briefs and authorities submitted upon behalf of plaintiffs and defendants does hereby make its

Findings of Fact

I.

The plaintiff Panama Steamship Co., Ltd., at all times material was and now is a foreign corporation and the owner of the Steamship "Nikolos".

II.

The plaintiff Seatankers, Inc., at all times material was and now is a foreign corporation and time charterer of the Steamship "Nikolos".

III.

The plaintiff Socrates Paleocrassas at all times material was and now is an individual and the Master of the Steamship "Nikolos".

IV.

At all times material, the defendants James O. Willoughby, John Doe One, whose real and true name is Virgil Rogers, and John Doe Two, whose real and true name is Willard Richards, were and

are now members of defendant Marine Cooks and Stewards, AFL, a voluntary association and autonomous national labor union with its headquarters in San Francisco, California and a branch office in Seattle, Washington. At all times material, defendant Willoughby was and is now the duly authorized Port Agent of defendant Marine Cooks and Stewards, AFL at Seattle, Washington, and its principal officer and agent in the Puget Sound area.

V.

The Steamship "Nikolos" at all times material was and now is a foreign merchant vessel registered under the laws of the Republic of Liberia (Official No. 396), having aboard a full cargo of some 8,570 long tons of bulk salt loaded at the port of Black Warrior Lagoon on the Pacific West Coast of Mexico for transportation to the Port of Tacoma in the State of Washington there to be discharged at a safe berth for delivery to the consignee Hooker Electrochemical Company, all pursuant to lawful charter and affreightment contract as effective during the current voyage.

VI.

The Master, Officers, and Crew of said Steamship are all aliens, none being a citizen of the United States. That such Officers and Crew are serving aboard said Steamship under Articles of Employment subject to the laws of the Republic of Liberia.

VII.

Pursuing the voyage called for by said charter

and contract, said SS "Nikolos" arrived in Tacoma Harbor, Washington, about 01:50 A.M., on June 10, 1957.

VIII.

Promptly after having so arrived said Steamship became lawfully entitled to discharge and deliver said cargo having then been cleared and passed by the United States Immigration, Quarantine, and Customs authorities.

IX.

Shortly thereafter, in the early morning hours of the 10th of June, 1957, said Steamship was approached at anchorage by the vessel "Will-O-Bee" displaying a "Picket Boat" sign, operating as such and carrying the defendant James O. Willoughby who boarded said Steamship and who then and there notified the Master that said Steamship was being picketed by the defendant Marine Cooks & Stewards, AFL.

X.

Thereafter said vessel "Will-O-Bee", operated by defendants James O. Willoughby, Virgil Rogers and Willard Richards continued to act as a picket boat around said SS "Nikolos".

XI.

Both prior to and subsequent to the arrival of the SS "Nikolos" the defendant Willoughby threatened said Hooker Electrochemical Company with establishment of a picket line at its dock if said SS "Nikolos" was allowed to berth thereat.

San Francisco, California, and are identified as follows:

1. Complaint (with Affidavits of Alvin E. Schultze, Socrates Paleocrassas and Carl R. Swenson (requested by Items 4, 5 and 6 of Defendants' Designation) (filed June 13, 1957).

2. Summons, with Marshal's return of service of Summons, Complaint and order to Show Cause upon: James O. Willoughby, individually and as business agent for Marine Cooks, etc. and Virgil Rogers (John Doe I) and Willard Richards (John Doe II) (requested by Items 1 and 2 of Plaintiffs' Designation) (filed June 28, 1957).

3. Order to Show Cause (filed and entered June 14, 1957).

4. Affidavit of James O. Willoughby to Order to Show Cause (filed June 15, 1957).

5. Findings of Fact and Conclusions of Law (filed and entered June 19, 1957).

6. Temporary Injunction (filed and entered June 19, 1957).

7. Notice of Appeal, defendants above named (filed July 1, 1957).

8. Cost Bond on Appeal (filed July 1, 1957).

9. Statement of Points (filed July 1, 1957).

10. Defendants' Designation of Contents of Record (filed July 1, 1957).

11. Request for Forthwith Certification (filed July 1, 1957).

12. Order for Transmittal of Original Exhibits (filed July 2, 1957).

XII.

Said picketing and threats of picketing were intended to prevent the SS "Nikolos" from receiving assistance in proceeding from anchorage to a berth and from being granted a berth for the discharge of its cargo.

XIII.

The picketing by the defendants Marine Cooks & Stewards, AFL, James O. Willoughby, Virgil Rogers and Willard Richards, and their threats to continue the same constitute acts of unlawful interference with international commerce and particularly the right of plaintiffs to carry out an international voyage and maritime contract of affreightment with a vessel lawfully registered by a friendly foreign nation manned by an alien crew under foreign shipping articles.

XIV.

As a result of said picketing and threat of picketing tenders of the ship by plaintiffs to Hooker Electrochemical Company were refused and the vessel was unable to obtain moorage at the discharging dock. That as a further result of said picketing and threats of picketing a tug requested by plaintiffs to assist the vessel from anchorage to dock refused to do so.

XV.

That as a result of the foregoing plaintiffs' vessel has been idle since June 10, 1957 and plaintiffs have thereby sustained substantial actual damages.

XVI.

Plaintiffs or some of them have entered into and are seeking other contracts of affreightment covering the carriage of like cargoes from Mexican ports to United States ports in the Puget Sound area and to Hooker Electrochemical dock in Tacoma aboard the SS "Nikolos" and/or other similarly registered and manner vessels, owned, operated or chartered by plaintiffs, or some of them.

XVII.

That by reason of the activities of the defendants Marine Cooks & Stewards, AFL, James O. Willoughby, Virgil Rogers and Willard Richards plaintiffs have suffered additional damage in that the SS "Nikolos" has acquired the reputation of a "hot ship" and plaintiffs' reputations for carrying out their contract obligations have been impaired, which damage is irreparable and incapable of computation.

XVIII.

That the United States as a nation has international obligations with respect to commerce and with respect to the relations of this country with friendly maritime nations and the acts of defendants might impair such obligations and cause irreparable damage to such relations.

XIX.

Defendants will continue to picket said vessel and to threaten to picket the same and other vessels of the plaintiffs similarly engaged as specified in Find-

13. Plaintiffs' Designation of Additional Portion of Record on Appeal (filed July 6, 1957).

14. Reporter's Supplemental Transcript of Proceedings, in which is contained Court's Oral Decision (requested by Item 11 of defendants' Designation, and also Items 3 and 4 requested by Plaintiffs' Designation).

I further certify that as a part of the Record on Appeal I am transmitting herewith the following original exhibits which were admitted in evidence in the above entitled cause, to wit:

Plaintiffs' Exhibits, Nos. 1, 2 and 3.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal (defendants) $5.00, and that the said fee has been paid to the Clerk by the said defendants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 12th day of July, 1957.

[Seal] MILLARD P. THOMAS,
Clerk,

/s/ By E. E. REDMAYNE,
Deputy.

ing XVI above unless restrained and enjoined from so doing; and plaintiffs will continue to sustain substantial financial damage if such picketing and threats of picketing are continued, much of which damage and injury to plaintiffs will be irreparable.

XX.

Greater injury will be inflicted upon plaintiffs by the denial of an injunction against the unlawful picketing and threats of picketing by defendants than will be inflicted upon defendants by the granting of such relief.

XXI

Plaintiffs have no adequate remedy at law.

XXII.

Public officers charged with the duty to protect plaintiffs' property are unable to furnish adequate protection, as shown by the lack of evidence of any action by such authorities. No public officer, federal, state or local is charged with the responsibility or in fact authorized to protect the SS "Nikolos" from the activity of the vessel "Will-O-Bee" in circling around and operating near the SS "Nikolos" while at anchorage.

XXIII.

There has been no fraud, or physical violence to persons or tangible property or threats thereof by defendants, or any of them.

XXIV.

As a result of the engagement in this trade by the plaintiffs in vessels of foreign registry, vessels of

American registry and operated and manned under contracts with the defendant unions have lost or will lose such business with resultant loss of employment to members of defendant labor organizations.

Whereupon the court makes the following

Conclusions of Law

I.

The court has jurisdiction of the parties and the subject matter in this cause. The court is not deprived of jurisdiction to grant an injunction by the Norris-LaGuardia Act (29 U.S. Code §101 et seq), or by any other statute of the United States.

II.

Both because the term "labor dispute" as used in the Norris-LaGuardia Act does not contemplate a dispute foreign in nature and because the evidence does not otherwise show it, there is no labor dispute between plaintiffs, or any of them, and defendants, or any of them, nor between defendants, or any of them and the officers and members of the crew of the SS "Nikolos", or any of them, nor between plaintiffs, or any of them and any of the officers or members of the crew of said vessel.

III.

Even if there were a labor dispute, defendants would have no right to interfere in the internal economy of a vessel registered under the flag of a friendly foreign power nor to prevent such a vessel from lawfully loading or discharging cargo at ports

of the United States. Defendants picketing and threats of picketing are unlawful interference with foreign commerce.

IV.

Plaintiffs are entitled to an order restraining and enjoining during the pendency of this action the defendants Marine Cooks and Stewards, AFL, James O. Willoughby, Virgil Roberts and Willard Richards, members of the aforesaid defendant voluntary association (and all other persons who are now or may hereafter be engaged by the said defendants or any of them or may be acting with or for them in doing any of the acts and things hereinafter specified) from establishing or maintaining or causing to be established or maintained or in any manner encouraging, aiding or abetting in the operation and use of a picket boat or any other craft or object as an instrumentality of picketing around or near the SS "Nikolos" or any other vessel registered under a foreign flag and manned by an alien crew under foreign articles and either owned, operated or chartered by the plaintiffs or any of them that may arrive hereafter in the Puget Sound area while said vessel or vessels are in waters within the jurisdiction of this court, or to prevent, obstruct or impede the SS "Nikolos" or other such vessels in proceeding to or from any berth in the Port of Tacoma for the purpose of discharging and delivery of cargo; or establishing or maintaining or causing to be established or maintained or in any manner encouraging, aiding or abetting in the establishment or maintenance of pickets or picket lines at or near

any dock or berth at which the SS "Nikolos" or other such foreign flag vessels of the plaintiffs or any of them as referred to hereinabove may be located or at any other place where it is necessary for persons having business with said vessel to pass; or from placing signs or doing any other act or thing tending to prevent plaintiffs from continuing with the voyage of the SS "Nikolos", or other such vessels of the plaintiffs or any of them as referred to hereinabove.

V.

An injunction bond in the amount of $5,000.00 shall be filed by plaintiffs.

Done in Open Court at Tacoma, Washington, this 19th day of June, 1957 at 3 o'clock P.M.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved as to form:

/s/ DUANE VANCE,
Of Attorneys for Defendants, Marine Cooks and Stewards, AFL-CIO, James O. Willoughby, Virgil Rogers, and Willard Richards.

Presented by:

/s/ CHARLES B. HOWARD,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed June 19, 1957.

In The United States District Court, Western District of Washington, Southern Division

Civil No. 2168

PANAMA STEAMSHIP CO., LTD., a corporation, SEATANKERS, INC., a corporation, and SOCRATES PALEOCRASSAS, an individual, Plaintiffs,

vs.

MARINE COOKS & STEWARDS, AFL, a voluntary association, et al., Defendants.

TEMPORARY INJUNCTION

This matter having come on for hearing before the undersigned Judge of the above entitled court at Tacoma, Washington on June 15 and continuing on June 17, 1957 upon an order to show cause why a preliminary restraining order or tempofary injunction should not be issued against the defendants as prayed for in the verified complaint on file herein, plaintiffs appearing and being represented by their attorneys Summers, Bucey & Howard, Charles B. Howard and John D. Mosser of counsel, defendants Marine Cooks and Stewards, AFL, a voluntary association and James O. Willoughby, and Virgil Rogers and Williard Richards otherwise designated as John Doe One and John Doe Two respectively, individual members of the above voluntary association appearing and being represented by J. Duane Vance and Ivar Peterson, their

attorneys, the International Organization of Masters, Mates and Pilots, Inc., a corporation, and George J. Decker and Delbert J. Kelley otherwise designated as William Doe One and William Doe Two respectively, individual members of the above corporation, appearing and being represented by their attorneys Levinson and Friedman, Sam Levinson of counsel, the International Brotherhood of Longshoremen, a voluntary association, and L. B. Connell otherwise designated as Joe Doe One, individual member of the above voluntary association appearing and being represented by Jack E. Tanner, their attorney, and the other defendants not having been served and not being before the court; the court having considered the verified complaint, the affidavits filed in support of and opposition thereto, the oral testimony of witnesses produced on behalf of the plaintiffs and the defendants and having heard arguments of counsel and considered the briefs and authorities submitted upon behalf of plaintiffs and defendants and having heretofore orally announced its decision and made and entered its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that defendants Marine Cooks and Stewards, AFL, James O. Willoughby, Virgil Roberts and Willard Richards, members of the aforesaid defendant voluntary association and all other persons who are now or may hereafter be engaged by the said defendants or any of them or may be acting with or for them in doing any of the acts and things hereby

enjoined, be and they are hereby restrained and enjoined during the pendency of this action from:

1. Establishing or maintaining or causing to be established or maintained or in any manner encouraging, aiding or abetting in the operation and use of a picket boat or any other craft or object as an instrumentality of picketing around or near the SS "Nikolos" or any other vessel registered under a foreign flag and manned by an alien crew and owned, operated or chartered by the plaintiffs or any of them that may arrive hereafter in the Puget Sound area while said vessel or vessels are in waters within the jurisdiction of this court, or to prevent, obstruct or impede the SS "Nikolos" or other such vessels in proceeding to or from any berth in the Port of Tacoma for the purpose of discharging and delivery of cargo; or

2. Establishing or maintaining or causing to be established or maintained or in any manner encouraging, aiding or abetting in the establishment or maintenance of picket or picket lines at or near any dock or berth at which the SS "Nikolos" or other such vessels as referred to in paragraph 1 above may be located or at any other place where it is necessary for persons having business with said vessel to pass; or from placing signs or doing any other act or thing tending to prevent plaintiffs from continuing with the voyage of the SS "Nikolos" or other such vessels as referred to in paragraph 1 above.

It Is Further Ordered that no person other than

the expressly named defendants hereby enjoined shall be affected by this order until served with a certified copy of the same and that a certified copy of this order shall be served by the United States Marshal at the request of plaintiff's counsel upon any person who may now or hereafter during the pendency of this case be engaged in doing any of the acts and things from which they are hereby restrained and enjoined.

Done In Open Court at Tacoma, Washington, this 19th day of June, 1957, at 3 P.M. o'clock.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ CHARLES B. HOWARD,
Of Attorneys for Plaintiff.

Approved as to form:

/s/ J. DUANE VANCE,
Of Attorneys for Defendants, Marine Cooks & Stewards, AFL-CIO, James O. Willoughby, Virgil Rogers and Willard Richards.

[Endorsed]: Filed June 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendants, Marine Cooks and Stewards, AFL, a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the temporary injunction entered in this action June 19, 1957.

VANCE & PETERSON,
Attorneys for Appellants, Marine Cooks and Stewards, AFL, James O. Willoughby, Virgil Rogers and Willard Richards.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 1, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, Marine Cooks & Stewards, AFL, a voluntary association, et al., as Principal, and United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, authorized to do the business of surety in the State of Washington, as surety, acknowledge ourselves to be jointly indebted to Panama Steamship Co., Ltd., a corporation, et al., appellees in the above entitled cause, in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, conditioned that, whereas, on the 19th day of June,

1957, in the District Court of the United States for the Western District of Washington, Southern Division, in a suit pending in that court wherein Panama Steamship Co., Ltd., a corporation, et al., was plaintiff, and Marine Cooks & Stewards, AFL, a voluntary association, et al., was defendant, a temporary injunction was entered and the said defendants having filed in the office of the clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California:

Now, Therefore, the condition of the above obligation is such that if the said Marine Cooks & Stewards, AFL, a voluntary association, et al., shall prosecute its appeal to effect and answer all costs, if the appeal is dismissed or by judgment affirmed, or all such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

Sealed with our seals and dated this 27th day of June, 1957.

MARINE COOKS & STEWARDS, AFL,

/s/ By JAMES O. WILLOUGHBY.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY,

/s/ By D. E. ROGERS,
Attorney-in-fact.

Certificate of Authority Attached.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 1, 1957.

[Title of District Court and Cause.]

REQUEST FOR FORTHWITH CERTIFICATION OF THE RECORD TO THE CLERK OF THE COURT OF APPEALS

Come now the defendants, Marine Cooks and Stewards, AFL, a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards, and having duly filed their notice of appeal herein, together with the usual bond for costs, request that the record herein be forthwith certified to the United States Court of Appeals for the Ninth Circuit in accordance with the provisions of the Act of March 23, 1932, Chapter 90, Section 10 (29 USCA, Section 110).

VANCE & PETERSON,
Attorneys for Named Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 1, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

Upon the application of counsel for the appealing defendants as shown by his signature hereon it is

Now Therefore, ordered that the Clerk of the Court shall transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit as a part of the record on appeal, the originals of all exhibits herein.

Done this 2nd day of July, 1957.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ J. DUANE VANCE,
VANCE & PETERSON.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 2, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and exhibits, in the above entitled cause, as are designated by the written Designation of the Contents of the Record on Appeal of the defendants above named, and the Designation of Additional Portion of the Record of plaintiffs above named, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Temporary Injunction of the above entitled Court, filed and entered on June 19, 1957, to the United States Court of Appeals for the Ninth Circuit at

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Taken in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, on Saturday, June 15, 1957, at the United States Courthouse, Tacoma, Washington.

Appearances: On behalf of the Plaintiffs: Mr. Charles B. Howard, Summers, Bucey & Howard, Attorneys at Law, 840 Central Building, Seattle, Washington. Mr. John D. Mosser, Wood, Matthiessen, Wood & Tatum, Attorneys at Law, 1310 Yeon Building, Portland, Oregon.

On behalf of the Defendant Marine Cooks & Stewards, AFL, and Defendant James O. Willoughby: Mr. J. Duane Vance, and Mr. Peterson, Vance and Peterson, Attorneys at Law, 230 Sixth Avenue North, Seattle, Washington. [2]*

On behalf of the Defendant International Organization of Masters, Mates, & Pilots, Inc.: Mr. Samuel Levinson, Levinson & Friedman, Attorneys at Law, Northern Life Tower, Seattle, Washington.

On behalf of the Defendant International Longshoremen's & Warehousemen's Union, Local 19: Mr. Philip J. Poth, Attorney at Law, 4th & Pike Building, Seattle, Washington.

On behalf of the Defendant International Brotherhood of Longshoremen: Mr. Jack E. Tanner, At-

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

torney at Law, Puget Sound Bank Building, Tacoma, Washington. [3]

Proceedings

The Court: Good morning, gentlemen. Panama Steamship Company vs. Marine Cooks and Stewards, and others.

Mr. Howard: May it please the court, appearing on behalf of the plaintiffs named in the complaint, we are this morning asking your Honor to consider the issuance of a preliminary restraining order against the defendants in civil cause No. 2168.

Mr. Levinson: I think, your Honor, it would be of some assistance if we have the appearances.

The Court: I think it would be very desirable.

Mr. Howard: I have been informed by the United States Marshals at Seattle and at Tacoma in this Western District of Washington that before 5 o'clock yesterday afternoon copies of the Summons, Complaint, and the Order to Show Cause were served on the following persons——

The Court: After you name each one, then, perhaps if counsel appearing for that defendant will speak up and identify himself.

Mr. Howard: At Tacoma service was made on [4] Mr. Rogers and a Mr. Willard Richards, identifying themselves as members of the Marine Cooks and Stewards, AFL, and upon Mr. J. O. Willoughby who is identified in the complaint by that name as being Business Agent Representative——

The Court: They are represented by Mr. Vance

and Mr. Peterson of Vance and Peterson, is that correct?

Mr. Vance: That is correct, the organization and Mr. Willoughby whom we concede to be a Seattle agent, and if these two men—individual men who were served are members of that organization, then, we will represent them. I am not in a position—I can ask Mr. Willoughby—they are both members?

Mr. Willoughby: Yes.

Mr. Vance: I will be appearing for both of those individuals.

The Court: Thank you.

Mr. Howard: Also at Tacoma a Mr. L. B. Connell was served as a John Doe member of the International Brotherhood of Longshoremen. He is identified, according to the directories, as the Secretary of that organization here in Tacoma. [5]

Mr. Tanner: Your Honor, my name is Jack E. Tanner representing the International Brotherhood of Longshoremen located in Tacoma.

The Court: Thank you.

Mr. Howard: At Seattle a Captain George Decker and Captain D. J. Kelly, members of the International Organization of Masters, Pilots, Incorporated, a corporation, were served as William Doe One and William Doe Two.

Mr. Levinson: Levinson of Levinson and Friedman appears for the International Organization of Pilots or the two individuals served.

The Court: Thank you.

Mr. Howard: Also at Seattle a Mr. William Gettings as a member of the International Long-

shoremen and Warehousemen's Union, he being identified as Regional Director of that organization.

Mr. Poth: Your Honor, my name is Philip J. Poth, attorney, and I wish to especially appear for International Longshoremen and Warehousemen's Union, Local 19. Mr. William Gettings has no connection whatsoever with Local 19. Local 19 is a separate independent body which has its own offices, president and secretary, and [6] is affiliated only to the International Longshoremen's and Warehousemen's Union. Mr. Gettings happens to be the Representative of the International. He does not represent Local 19, so it is our position that Local 19 is not and has not been properly served.

Mr. Howard: Those are the services that were made before 5 o'clock yesterday afternoon as reported to me by the Marshal who indicated that their men would stand by in the event formal proof was necessary of that service before they had an opportunity to file their formal returns.

The Court: Are there any other parties now appearing in any capacity?

(No response.)

The Court: Very well. Proceed.

(Thereupon opening statements of counsel were rendered.)

Mr. Howard: I would like to call as my first witness a Mr. Boersig. [7]

Mr. Howard: May it please the Court, I believe that counsel for the plaintiffs and counsel for the defendants are prepared to stipulate in open court that with the Court's approval, it may be under-

stood that if the witnesses Schultze, Swenson, and Paleocrassas were called, they would give testimony as set forth in their affidavits, reserving to the defendants the right of cross examination and the right of plaintiffs to any further examination of those witnesses.

Mr. Levinson: We will so stipulate.

Mr. Vance: I want to ask one question, are the gentlemen named present in court?

Mr. Howard: Those three gentlemen are present, and I will make arrangements to have them remain in attendance.

Mr. Vance: As far as the defendants I represent that is agreeable conditioned upon the similar agreement of counsel for the plaintiffs concerning the affidavits and statements there of James O. Willoughby, defendant.

Mr. Howard: He is in court and will remain, otherwise agreed.

Mr. Vance: He is in court.

The Court: It is so agreed that I may deem the testimony given by Willoughby, Schultze, Swenson, and [7a] Paleocrassas as stated in their affidavits, is that correct?

Mr. Levinson: Yes.

Mr. Howard: For the purpose of this application.

The Court: For the purrpose of this particular proceedings. [7b]

HARRY BOERSIG

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Harry Boersig, B-o-e-r-s-i-g. I am engaged in commercial photography.

Direct Examination

Q. (By Mr. Howard): What is your occupation?

A. Photographer, commercial photographer.

Q. Did you on June 13, 1957, take some pictures of vessels in Tacoma Harbor? A. I did.

Q. And at whose request were those pictures taken?

A. Mr. Carl Swenson from the J. T. Stevedore Company.

Q. And what subject matter were the pictures taken of?

A. Of a vessel lying at the mouth of the Hylebos Waterway and the picket boat supposed to have been out.

Q. What time of day were they taken?

A. It was in the afternoon. I would say it was around 5 o'clock, somewhere in the neighborhood of that.

Q. What means did you proceed to take the pictures? [8] A. From an airplane.

The Clerk: Plaintiffs' Exhibits 1 and 2 have been marked for identification.

(Testimony of Harry Boersig.)

Q. (By Mr. Howard): I will hand you Plaintiffs' Exhibits 1 and 2 for identification. Will you state what those are?

A. These are the pictures I took the day mentioned.

Q. Did you subsequently develop those?

A. Yes.

Q. And can you identify the vessels that are involved in the pictures, or either one of them?

A. The name is very faint on the large vessel. The name is almost obliterated. I don't exactly know what the name is.

Q. Could you see the name of the vessel before you took the picture? A. No.

Q. Can you make out the name on the picture?

Mr. Vance: Let's take a look at them and we will stipulate. The defendants I represent will stipulate that as far as Plaintiffs' Exhibit 1 is concerned, that it is the S. S. Nikolas, and the smaller boat in the lower right hand corner is the Will-O-Bee, the boat belonging to Mr. Willoughby, the defendant, and referred to in [9] this action. As to Plaintiffs' Exhibit 2, that appears to be the S. S. Nikolas. We are unable to identify the small boat in the foreground. It may or may not be the Will-O-Bee. We have no objection to the exhibits.

The Court: Exhibits 1 and 2 are admitted in evidence.

Mr. Howard: I offer them.

(Thereupon Plaintiffs' Exhibits 1 and 2 for identification were received into evidence.)

Mr. Howard: That is all I have of this witness.

Mr. Vance: No questions.

Mr. Levinson: No question.

JAMES O. WILLOUGHBY

one of the defendants herein, called as a witness on behalf of the plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: James O. Willoughby, W-i-l-l-o-u-g-h-b-y. [10]

Direct Examination

Q. (By Mr. Howard): What is your address, Mr. Willoughby?

A. Do you want my business address?

Q. I would like your residence address.

A. 19812 Fourth Avenue, Seattle 88, Washington.

Q. 19812 Fourth South? A. Yes.

Q. What is your occupation?

A. I am Port Agent of the Marine Cooks and Stewards.

Q. Where do you maintain your office?

A. 2505 First Avenue in Seattle, Washington.

Q. When did you first become interested in the activities of the steamer Nikolas?

A. Upon hearing that she was put in to Seattle—some couple weeks ago that she was to put in to Seattle with a load of salt for Hooker Chemical.

The Court: Do you mean at Tacoma?

(Testimony of James O. Willoughby.)

The Witness: Yes, I mean Tacoma.

Q. (By Mr. Howard): From whom did you first receive notification of the expected arrival of the Nikolas?

A. I don't believe I could properly answer that. I can't remember exactly who I learned this from, whether it was the intelligence—Marine Intelligence, or whether it was by word of mouth, from someone. [11]

Q. Do you know when the Nikolas arrived at the Port of Tacoma, Washington?

A. Not the hour. I could tell you approximately.

Q. Would it have been on June 10, 1957, last Monday?

A. Sometime during the late P.M. or early A.M. hours of Sunday and Monday.

Q. I will ask you, Mr. Willoughby, if you are the owner of the small boat designated the "Will-O-Bee" which appears in Plaintiffs' Exhibit No. 1?

A. That is registered in my name.

Q. Now, when was that boat brought to Tacoma?

A. I arrived in Tacoma Harbor about 5:30 A.M. on Monday.

Q. And were you aboard the Will-O-Bee then?

A. Yes.

Q. Who else was aboard with you—strike that question. Were there some other members of the union?

A. There was another member. I can't bring it to mind who it was that was with me that morning.

(Testimony of James O. Willoughby.)

Q. Some other member of the Marine Cooks and Stewards Union? A. Yes.

Q. What activities did the Will-O-Bee—the cruiser Will-O-Bee engage in after arrival at the Port of Tacoma?

A. We approached the proximity of the Nikolas, circled her once, came alongside, and I was invited aboard by the Master—the Mate of the vessel. [12]

Q. At that time did the cruiser Will-O-Bee have displayed on it the sign such as appears in Plaintiffs' Exhibit No. 1, "Picket Boat?" A. It did.

Q. And were those signs continued to be displayed aboard the Will-O-Bee between June 10 and June 14, Friday? A. I would say periodically.

Q. And did the cruiser—where did the cruiser Will-O-Bee remain, in and about the steamer Nikolas between June 10 and June 14?

A. Spasmodically.

Q. Where did it go when it left there?

A. We would go up—I don't know whether you would call it a canal or a waterway there.

Q. The Hylebos Waterway?

A. I don't know the name of it.

Q. Where did the ship tie up when it went up the waterway?

A. We tied to some floating—you could call it a float made out of logs and so forth.

Q. At what logs?

A. That was at the corner—approximately at the corner of Hooker Chemical and the Navy Yard.

Q. Is it not a fact that that float was adjacent

(Testimony of James O. Willoughby.)

to the property of the Hoker Electro-Chemical Company? A. It probably was. [13]

Q. Did you at any time have an occasion to be on the premises of the Hooker Electro-Chemical Company between June 10 and June 14?

A. Oh, yes.

Q. Frequently? A. Yes, several times.

Q. And did you pass through that plant to and from the cabin cruiser Will-O-Bee? A. Yes.

Q. Now, were there subsequently additional signs placed aboard the picket boat Will-O-Bee?

A. On Friday, I believe it was, Friday morning we had a smaller sign that we threw over the side.

Q. What did that sign state?

A. "AFL-CIO seamen protest. Loss of their livelihood to foreign flagships with substandard wages or substandard conditions."

Q. And that sign was displayed on the picket boat on Friday, June 14?

A. About that time.

Q. Where is the cruiser Will-O-Bee now?

A. Somewhere in the area of the State of Washington. I really couldn't tell you now.

Q. At any time prior to the arrival——

The Court: Western or eastern? [14]

The Witness: That is western, sir. The waters of the State of Washington I should have said.

Q. (By Mr. Howard): At any time prior to the arrival of the steamer Nikolas on June 10, did you

(Testimony of James O. Willoughby.)

have any occasion to talk with a Mr. Carl Swenson of the J. T. Stevedore Company?

A. Prior to the arrival?

Q. Prior to the arrival of the steamer on June 10. A. Yes.

Q. Do you recall about when that was?

A. In the week prior to her arrival on Sunday.

Q. What was the nature of that conversation?

A. I was asking for information about the vessel, what her status was, what the conditions was, what the flagship—what flagship she belonged to, and so forth.

Q. Did you on any occasion prior to the arrival of the Nikolas have any discussion with Mr. Swenson as to the purpose of your calls and what you intended to do?

A. Well, I told him that by virtue of the policy of my union that I was interested in the wages, hours, and conditions existing aboard the ship.

Q. That was prior to its arrival?

A. Yes, I believe it was.

Q. Now, have you talked to Mr. Swenson subsequent to the [15] arrival of the vessel?

A. Possibly I have in answer to his questions or something like that.

Q. At any time prior to June 14—correction—at any time prior to June 10 did you notify Mr. Swenson that efforts would be made to establish a picket boat or a picket line around the steamer Nikolas?

(Testimony of James O. Willoughby.)

A. I could have. I don't remember, but I could have.

Q. Now, did you prior to June 10 have any occasion to talk with a Mr. Gentes of the Hooker Electro Chemical Company? A. Yes.

Q. Concerning the Nikolas? A. That's right.

Q. And when would those conversations have taken place?

A. I couldn't specify the time I talked to him, several different times during the week.

Q. That would be the week prior to the arrival of the vessel, is that right?

A. No. That would be the week after the arrival of the vessel.

Q. Did you talk to Mr. Gentes before the Nikolas arrived in Tacoma Harbor?

A. Not to my memory, unless it was by phone and I didn't know who he was.

Q. I will ask you if you made some request from Mr. Gentes [16] of the Hooker Electro Chemical Company for permission to have members of your union on the plant or around the facilities of Hooker Electro Chemical Company?

A. I didn't exactly make a request. I believe I was invited to use any facilities, telephone, or otherwise, that I needed to while I was there.

Q. As a matter of fact, you have maintained representatives of your union at the Hooker Electro Chemical Company plant during the past week, have you not?

A. They have been aboard the cruiser. If you

(Testimony of James O. Willoughby.)

want to call it at the plant being tied alongside this float and they pass through there going to and from it, yes.

Q. Have you also had representatives of the Marine Cooks and Stewards, AFL, in the parking lot of the Hooker Electro Chemical Company?

A. Their cars have been in the parking lot.

Q. And the men themselves have been there?

A. Going to and from.

Q. Have you had any occasion, Mr. Willoughby, to communicate with representatives of the Inland Boatmen's Union concerning the Nikolas?

A. No. I have tried. I have tried to contact them several times but I never was able to do so as I was over here most of the time.

Q. Have you had any occasion to contact representatives [17] of the International Brotherhood of Longshoremen concerning the Nikolas?

A. I have talked to a number of them.

Q. Who have you talked to?

A. I really couldn't identify them except to know them by sight.

Q. Persons here in Tacoma?

A. In Tacoma. They must live in Tacoma. I just take it supposedly that they live in Tacoma.

Q. Have you enlisted their support and cooperation in connection with the activities that you have been engaged in? A. No.

Q. You have not done so? A. No.

Q. Have you notified them?

A. They were notified.

(Testimony of James O. Willoughby.)

Q. They were advised of those activities?

A. They were advised by a group of people who came down from Seattle not to my knowledge, that put themselves out in front and told them when they came to work that they had picket signs on them and protest signs.

Q. Who were these people from Seattle that you are referring to?

A. They were different seamen from different unions. [18]

Q. What unions did they represent?

A. I don't know. I don't know.

Q. Were they representatives of the Sailors' Union of the Pacific?

A. They could have been. I don't know their names and didn't know except, as I say, by sight. I don't know who they were.

Q. Have you at any time communicated with any members of the Sailors' Union of the Pacific regarding the activities that you are conducting in connection with the arrival of the S. S. Nikolas?

Mr. Vance: If the Court please, in order—I think for the purposes of this proceeding that is here on a temporary injunction, where Mr. Willoughby and by myself in the absence of Mr. Willoughby and his organization, Marine Cooks and Stewards, have admitted that they caused this picket boat to be placed out there and maintained it there, that I do think it is irrelevant and immaterial for counsel to go into conversations with de-

(Testimony of James O. Willoughby.)

fendants not yet served, if any, as to some which would——

The Court: I think not, Mr. Vance. I think it is material. Overruled.

Mr. Vance: I said that for two reasons, [19] one, he apparently is going to go into admissions against interest here in a court proceedings taking oral testimony against people who are not represented by counsel and have no right or opportunity to make the proper record, your Honor. Excuse me for interrupting.

I am thinking along these lines, your Honor, if they are charging a conspiracy, there is that constant line of objection that for the preservation of a record must be made where certain comments are not admissible as against one or the other of the parties in a lawsuit, and I hate to see this record burdened with things——

The Court: I don't want to see it burdened with anything that isn't germane to the issue, not on a special hearing of this kind and for the very narrow and limited purpose we have here, but I do think a reasonable inquiry into the matters you have just approached is a matter that will have bearing on this narrow issue.

Mr. Howard: I confess I lost track of the last union I directed a question to.

Mr. Levinson: Sailors' Union of the Pacific.

The Court: Yes, I think that was it.

Mr. Levinson: I don't think the question was answered. [20]

(Testimony of James O. Willoughby.)

The Court: I don't believe it was. I think I headed Mr. Willoughby off from answering the question. In substance I think the question was, have you contacted representatives of the Sailors' Union of the Pacific with respect of the Nikolas?

The Witness: No. The only contact I have with the Sailors' Union of the Pacific, we are housed in the same building and through necessity must talk to people who are right in my vicinity all the time. Is there any objection? I mean is counsel trying to establish that he objects to me talking to people within my own building?

Mr. Vance: Don't argue.

The Court: All you have to do is answer the question, Mr. Willoughby, and that is all.

The Witness: I would have to say in regards to the Nikolas, no, I haven't talked to anybody in regards to the Nikolas.

Q. (By Mr. Howard): Have you advised those persons in the Sailors' Union of the Pacific of your activities in establishing a picket boat around the S. S. Nikolas? A. No.

Q. Now, as to the International Longshoremen and Warehousemen's Union, have you advised their representatives or members? [21]

A. I have not.

Q. Have you spoken with representatives of any labor organization with offices and members in the Northwest here concerning the Nikolas?

A. No.

Q. You have not? A. No.

(Testimony of James O. Willoughby.)

Q. Incidentally, Mr. Willoughby, has the cruiser Will-O-Bee remained in the vicinity of the Nikolas or the waterway here at Tacoma Harbor 24 hours a day since its arrival on June 10?

A. Well, it was tied up—do you mean was we circling?

Q. I don't mean constantly circling, but remaining in the vicinity of the vessel or in the water.

A. No. We were tied up out of sight of the Nikolas in fact.

Q. That is down at the Hooker Electro Chemical Company? A. Yes.

Q. Which is in the waterway? A. Yes.

Q. And you have remained at one location or another 24 hours a day? A. Yes.

Q. Since the ship arrived on the morning of June 10? A. Not up until now, no.

Q. Until at least yesterday noon? [22]

A. Yes.

Q. Do you know, Mr. Willoughby, whether there are any members of the Marine Cooks and Stewards, AFL, among the crew members on the steamer Nikolas? A. I couldn't answer that.

Q. If there were some you would have a record of it, would you not? A. Not necessarily.

Q. Do you know whether there are any U. S. citizens aboard the steamer Nikolas?

A. No. I have had no conversation with them except the captain.

Q. Have there been any members of any other labor organizations aboard the cruiser Will-O-Bee,

(Testimony of James O. Willoughby.)

to your knowledge, other than members of the Marine Cooks and Stewards Union?

Mr. Vance: Do you mean in this dispute?

Q. (By Mr. Howard): During the period June 10 to June 14.

A. Not to my knowledge that I can remember.

Mr. Howard: That is all I have.

Mr. Vance: No questions.

The Court: Is there anyone else who wishes to interrogate this witness?

Mr. Levinson: Just one other question. [23]

Cross Examination

Q. (By Mr. Levinson): Are there members of your Marine Cooks and Stewards Union who are not American citizens? A. Pardon?

Q. Do you have members of your union who are not American citizens? A. Oh, yes, certainly.

Mr. Levinson: That is all. No further questions.

The Court: That is all, Mr. Willoughby.

(Witness excused.)

SOCRATES PALEOCRASSAS

one of the plaintiffs, called as a witness on his own behalf; being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Wtiness: Socrates. That is the intial name, you see.

The Clerk: Your last name, please.

The Witness: Paleocrassas, P-a-l-e-o-c-r-a-s-s-a-s.

Mr. Howard: May I have this book marked?

The Clerk: Plaintiffs' Exhibit No. 3 has been marked for identification.

Mr. Howard: If the Court please, this is the first of the witnesses to whom the stipulation would apply. They are already identified in the affidavits.

The Court: There is no need of covering the same ground which is in the affidavit.

Direct Examination

Q. (By Mr. Howard): Captain, handing you what has been marked for identification as Plaintiffs' Exhibit 3, will you state what that is?

A. This is on the Greek ships an agreement regarding the Greek seamen. Every four years we renew that. We expect another one this year, 1957. This is on the basis of what we pay the crew, but we pay more than that.

Mr. Levinson: Objected to as not responsive.

Q. (By Mr. Howard): Captain, are members of your crew on your vessel members of the unions

(Testimony of Socrates Paleocrassas.)

in Greece which are parties to this collective agreement? A. Yes.

Mr. Howard: I offer this in evidence with this suggestion, if the Court please, that this [25] is the Master's only copy. I have photostats of the pertinent pages which will be made available for substitution.

The Court: Go ahead with something.

Mr. Vance: Is this supposed to be an English translation here?

Mr. Howard: On one side of the page it is written in Greek and the other side is in English.

Q. (By Mr. Howard): That is a translation, is that correct? A. Yes, that is quite correct.

Mr. Vance: I have some voir dire on this, if the Court please.

The Court: Go ahead with it.

Examination On Voir Dire

Q. (By Mr. Vance): Mr.—is it Paleocrassas?

A. Yes.

Q. You are a native of Greece?

A. Yes, sir.

Q. And Master of the vessel the S. S. Nikolas?

A. Yes.

Q. Employed by what company?

A. Panama Steamship Company. [26]

Q. For what?

Mr. Howard: Panama.

Q. (By Mr. Vance): Panama? A. Yes.

Q. That company is incorporated where, sir?

(Testimony of Socrates Paleocrassas.)

A. In London. That is Monrovia.

Q. I am not a world traveler. Where is Monrovia? Is that part of the British Empire?

A. Monrovia is in the Liberian district.

Mr. Howard: Would it be Liberia?

The Witness: Yes, the west coast of Africa.

Q. (By Mr. Vance): What?

The Court: Monrovia is the capital of the nation Liberia.

Mr. Vance: Thank you, your Honor, I didn't know that.

Q. (By Mr. Vance): Is that part of the British Empire, Liberia?

A. Liberia is no part. It is independent.

Q. Who owns the vessel?

A. Panama Steamship Company.

Q. They own it? A. Yes.

Q. And they are the people you work for?

A. They work in London. Their offices are in London. [27]

The Court: He said they are the people that you work for. I don't think you heard the question.

Q. (By Mr. Vance): Do you work for Panama Steamship Company?

A. Yes, but the owners are Greek.

Q. Are you paid by the Panama Steamship Company? A. Yes.

Q. You are paid by them?

A. Yes, by them, by the Greeks—by our owners who put up the flag.

Q. You are paid by the Greeks?

(Testimony of Socrates Paleocrassas.)

A. Yes, we are Greeks.

Q. Well, I know, but you said that the——

A. Well, that is the title of the company.

Q. Greece?

A. Panama Steamship Company. That is the title of the company I am saying.

Q. Well, I thought you said that was a British corporation? A. No, it is not.

The Court: He didn't say that.

A. It is a Greek.

Q. (By Mr. Vance): It is a Greek corporation?

A. The title—that is the title of the company, the Panama Steamsh Company, but the owners are Greek.

Q. Owned by Greeks? [28] A. Yes.

Q. Greek nationals? A. Yes.

Q. Where is it incorporated?

A. In London.

Q. Well, that is a British corporation, is it not, if it is incorporated in England?

The Court: He is not following you.

Mr. Howard: I don't believe he understands your question.

The Court: When he says where is it incorporated, he means what country—where was the corporation formed, not where the offices are. Do you know what country?

The Witness: Well, Liberia. We have a Liberian flag.

Q. (By Mr. Vance): The vessel is registered under the Liberian flag? A. Yes.

(Testimony of Socrates Paleocrassas.)

Q. But any owner of any country, Captain, even an American.

A. They remain in London.

Q. Pardon?

A. In London. The managers are in London.

The Court: What he wants to know is what company is the corporation incorporated under?

The Witness: What company? Panama Steamship Company. That is the title of the company.

Mr. Howard: If I can expedite this at all, I am not sure that this will solve it. I happen to know that this is a Panamanian corporation. It doubtless would show on the ship's documents.

The Court: Don't let us waste a lot of time with that.

Mr. Vance: I don't think this is a contract, and I object to it. I don't think it has any bearing. It is purported to be signed for the union of Greek owners, and I don't think there is any foundation.

The Court: It may not, but I will admit it for whatever purpose it may have.

(Thereupon Plaintiffs' Exhibit No. 3 for identification was received into evidence.)

Mr. Vance: Furthermore than that, I call your Honor's attention to the fact that it is terminable at will on the part of the employer and without cause on the part of the Master, and, therefore, it is unilateral and no contract at all. It is dated back in 1951. I haven't had time enough to read it all but I have nothing [30] before me which shows that there is any intention that this thing

is still in effect some six years later. There is no showing that the company was a company, a member of the association which signed the agreement. There is no showing that—as a matter of fact, I don't see any signature of any union here as he talks about.

Mr. Howard: May I point that out to you, Mr. Vance?

Mr. Vance: I would appreciate it.

The Court: You can argue the effect of it later. I am going to admit for the limited purpose of this hearing and allow you to substitute photostats.

Mr. Vance: If your Honor please, rather than the excerpts——

The Court: You can have the entire document ultimately photostated if necessary.

Mr. Howard: We have only had part of it photostated. If we may have leave to change that?

The Court: We don't need to tend to that this morning. Go ahead.

Q. (By Mr. Howard): Captain, did you have an occasion to talk with a Mr. James Willoughby, the previous witness? A. Yes, I called him up.

Q. When did he come aboard?

A. I tell you exactly. I invited him on board, and he asked what we wanted and——

The Court: Mr. Paleocrassas, be careful now just to answer the question the man asks. Answer just what he asks. Don't go on to something else.

The Witness: When did he come aboard?

(Testimony of Socrates Paleocrassas.)

Mr. Vance: May we be advised of the nature of the document?

The Witness: 6:30 in the morning.

The Court: What are you looking at, the log?

The Witness: 6:30 in the morning.

Q. (By Mr. Howard): What language is the log written in? A. What?

Q. What language is the log or the log entries written in? A. When he came aboard?

The Court: No, what language are your entries in the book?

The Witness: In Greek.

Mr. Vance: Then, your Honor, I am going to object to his using a Greek document. I can't examine it and cross-examine the witness.

The Court: Overruled. You will have an [32] opportunity to do that if it becomes necessary.

Q. (By Mr. Howard): What was the nature of your discussion with Mr. Willoughby on this occasion on the morning of June 10?

A. Well, I asked him what he wanted.

Q. What did he indicate he wanted?

A. That I was interfering with the coastal trade.

Q. In the coastal trade or the intercoastal trade?

A. That is what he said. His friend, Mr. Swenson, was there too.

Q. Did Mr. Willoughby examine Exhibit 3, this agreement, at the time he was aboard your vessel?

A. No.

Q. Did he obtain from you the names of the

(Testimony of Socrates Paleocrassas.)

Greek unions with which the members of your crew are affiliated?

A. No. He just came on board and told me that the ship I brought——

The Court: Now, wait a minute, just answer the question, Mr. Paleocrassas. We will get along much quicker. Put the question again. Just answer the question and don't mention other things.

Q. (By Mr. Howard): Did Mr. Willoughby obtain from you at that time the name of the Greek unions with which your crew members are affiliated?

A. No.

Mr. Howard: That is all I have.

The Court: Cross-examine.

Mr. Howard: I offer at this time the testimony by affidavit which was given by this witness.

Mr. Vance: I do have one question.

Cross Examination

Q. (By Mr. Vance): Mr. Paleocrassas, you had a cargo of salt aboard the Nikolas at the time?

A. Yes.

Q. And it was picked up on the west coast of Mexico, sir? A. Yes.

Q. Had you gone to Mexico empty, sir?

A. Yes.

Q. Had the Nikolas ever engaged in the business of hauling salt from Mexico to the west coast of North America prior to that time?

A. No, that was the first time.

Mr. Vance: That is all I have.

(Testimony of Socrates Paleocrassas.)

Mr. Poth: I have one question, your Honor.

The Court: Yes, of course, Mr. Poth. [34]

Cross Examination

Q. (By Mr. Poth): Has the vessel been in Seattle recently? A. No.

Q. Has it ever been in to Seattle?

A. No, not that I know of. I have been Captain of the ship three years and I have never been. I don't know if it did when it was under the British flag.

Q. Now, have you any instructions now to proceed to Seattle on any voyage?

A. After this voyage?

Q. Yes. A. No.

Q. You have no contemplation of taking the vessel to Seattle, is that right? A. No.

Mr. Poth: No further questions.

The Court: That is all, Mr. Paleocrassas. You may step down.

(Witness excused.)

Mr. Howard: Call Mr. Swenson.

Mr. Vance: Mr. Howard offered the affidavit I presumed according to the stipulation, of course, and I didn't make the technical motion at the time, but, of course, I wasn't stipulating [35] that the matters contained in the affidavits were true or that the conclusions that are stated in the affidavits were properly drawn.

The Court: I understood that, of course.

Mr. Vance: I thought so, your Honor.

CARL RAYMOND SWENSON

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your name and spell your last name.

The Witness: Carl Raymond Swenson, S-w-e-n-s-o-n.

Mr. Howard: Your Honor, the stipulation applies to this witness also.

Direct Examination

Q. (By Mr. Howard): Mr. Swenson, when did you first have occasion to talk with Mr. Willoughby about the activities of the steamer Nikolas?

A. I believe is was on June the 6th.

Q. And what was the essence of the conversation at that time? [36]

A. I received a telephone call from him asking if I knew when she would arrive, what flag she was under, and he stated that under the policy of his union if the crew was not affiliated with unions acceptable to them, they would picket the ship.

Q. Prior to this conversation of Mr. Willoughby on June 6 had you received any indication from any source that the Marine Cooks and Stewards Union or other unions were concerned with the activities of the steamer Nikolas?

A. I had received information on, I believe it was Monday, June 3, that there was some indication of labor trouble and——

(Testimony of Carl Raymond Swenson.)

Mr. Vance: I object to hearsay and indications of what he heard.

The Court: Yes. The form of that response is objectionable. That part will be stricken. Go ahead.

Q. (By Mr. Howard): From whom did you receive this word?

A. At approximately noon on June the 3rd, Monday, I received a telephone call from our principals in New York City, the charterers of the vessel.

Q. What did you do thereafter?

A. I immediately went down to the Hooker plant to see if there was any labor trouble. I didn't see any sign of [37] any, and I went in and spoke to their Traffic Manager and inquired from him if there was any.

Q. Prior to the arrival of the steamer Nikolas in Tacoma Harbor on June 10, did you gain information as to the prospect of picketing activities in connection with the steamer Nikolas?

Mr. Levinson: Objected to as leading.

Mr. Vance: I will join that.

The Court: The preliminary question is in a very narrow sense appropriate. Just answer it yes or no. Did you learn something of that kind?

The Witness: May I ask you to repeat the question?

The Court: Rephrase it.

Q. (By Mr. Howard): Before the steamer Nikolas arrived in Tacoma Harbor on the morning of

(Testimony of Carl Raymond Swenson.)

June 10th, had you received any information as to the likelihood of picketing activities? Can you answer that yes or no? A. Yes. Yes.

Q. From what source?

A. From Mr. Willoughby.

Q. From Mr. Willoughby? A. Yes.

Q. Did you receive any similar indications from the Hooker [38] Electro Chemical Company?

Mr. Vance: I object to that as leading and suggestive.

The Court: Yes, it is leading and suggestive. I don't see that it is very material.

Q. (By Mr. Howard): Did you receive any similar information from other sources? A. Yes.

Q. From what source?

A. Hooker Company.

Mr. Vance: I object to what information he received.

The Court: Well, it isn't very important on this narrow issue in any event.

Mr. Vance: I will try not to object.

The Court: I am not irritated about it at all if I seem so. You misinterpreted. Just try and keep it narrowed to the very narrow issue we have on for today.

Mr. Howard: That is all the questions I have, your Honor.

Mr. Vance: No questions.

Mr. Levinson: No questions.

The Court: That is all, Mr. Swenson.

(Witness excused.) [39]

ALVIN E. SCHULTZE

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Alvin E. Schultze, S-c-h-u-l-t-z-e.

Mr. Howard: May the record show that the stipulation also applies to the testimony of this witness?

The Court: Yes.

Direct Examination

Q. (By Mr. Howard): Mr. Schultze, does the Seatankers Incorporated or the Trans-Sea Carriers Incorporated have any connection at all with the ownership of this vessel? A. No.

Q. What is the basis of your relationship with the steam Nikolas?

A. Seatankers Incorporated have this vessel under a time charter.

Q. Who is responsible for loading or discharging the vessel and providing harbor services such as pilotage and towage?

A. Seatankers Incorporated. [40]

Q. During the time that you have been in Seattle and after the arrival of the Nikolas on June 10, have you made efforts to obtain those services?

A. Yes.

Q. Have you been able to do so? A. No.

Q. And why not?

A. We were informed by the Foss Tugboat

(Testimony of Alvin E. Schultze.)

Company, the company from whom we ordered a towboat, that——

Mr. Vance: I object to any conversation they had with Foss Tugs.

The Court: If the Court please, this is an application for a preliminary restraining order, which conceivably, if the situation dictated, might even be applied for ex parte without any hearing, and in view of the very nature of the application I submit that it is a little difficult.

The Court: I will allow him to answer keeping in mind that it is possibly objectionable, and we will consider whether it is so after we have heard it. Go ahead.

Q. (By Mr. Howard): What did you learn from Foss?

A. After having ordered towboats to move the Nikolas to the Hooker Chemical plant on Wednesday, June 12, we were later informed about 4:30 p.m. by the Foss Towboat [41] Company that they would be unable to handle the vessel in view of the fact that they had been notified by a Mr. Fox of—I believe what is known as the Inland—representing the Inland Boatmen's Corporation that the vessel was so-called "hot" and that their crews would be unable to handle it.

Mr. Levinson: I move to strike, your Honor, upon the grounds of hearsay.

The Court: It is, of course, hearsay, but go ahead.

Mr. Vance: Double hearsay.

(Testimony of Alvin E. Schultze.)

Q. (By Mr. Howard): Have you since your arrival in Tacoma had any conversations with Mr. Willoughby? A. Yes, I have.

Q. Can you identify that as to time?

A. The first conversation I recall is on Monday, June 10, when I was informed that the information obtained by Mr. Willoughby——

Mr. Levinson: Just a moment——

The Court: Do you mean you were informed by Mr. Willoughby?

The Witness: Yes. That the information obtained from the ship would necessitate him passing that on through to San Francisco, and he would later let us know what the results was. [42]

Q. (By Mr. Howard): Did you subsequently have further conversations with Mr. Willoughby, and if so, when?

A. I did on the following morning.

Q. What was the nature of that conversation?

A. In conversation with the Western Shipping Company who represented the Nikolas for the owners in the United States at New York, we were informed—or I was informed——

Mr. Levinson: Just a moment. Your Honor, I think if is obviously not responsive.

The Court: Yes, it seems not to be.

Q. (By Mr. Howard): My question, Mr. Schultze, was as to the nature of your conversation with Mr. Willoughby on the morning of June 11.

A. I informed Mr. Willoughby that I understood

(Testimony of Alvin E. Schultze.)

that from information obtained from New York that the union affiliation question was cleared up at that end, and I asked him to facilitate having the information passed on to the West Coast and to him in order that the vessel might proceed about her business.

Q. Did you have subsequent conversations with Mr. Willoughby?

A. Later the same day Mr. Willoughby telephoned me and told me that the information that I had at hand apparently was not correct.

Q. Have you had further conversations with Mr. Willoughby [43] after June 11?

A. I don't recall any after June 11.

Q. Have you received any indication from any source that difficulty will be encountered in discharging the cargo from the vessel if it goes to berth at Hooker Electro Chemical?

Mr. Levinson: That is objected to upon the grounds it is leading, and further, it calls for a hearsay statement.

The Court: No, he said had he received it from any source. That is just a yes or no question. Then we will find out where it came from.

The Witness: Yes.

Q. (By Mr. Howard): From what source?

A. In conversation with Mr. Thronsen whom I understand represents the Public Relations Committee——

Mr. Vance: If the Court please, may I have a

(Testimony of Alvin E. Schultze.)

running objection to all hearsay, then I won't object any more.

The Court: I wish you would in order to avoid this type of thing.

Q. (By Mr. Howard): Did you receive information from any other source other than Mr. Thronsen?

A. I received information from Mr. Gettings that Gentes [44] of Hooker Chemical Company——

Q. At any time has it been brought to your attention that there is a threat of an invisible picket line?

Mr. Vance: I object to that as leading and suggestive.

The Court: Well, why don't we get around to where this is supposed to have come from first? Some third-hand rumor to that effect wouldn't be of any value in any case.

Mr. Howard: Well, I am trying to avoid getting into the hearsay question again, if the Court please.

The Court: Why don't you bring out who was supposed to have made some statement of this kind and then we will go from there.

Q. (By Mr. Howard): Has anyone since your arrival at Tacoma indicated to you that there is a threat of an invisible picket line, and if so, whom?

Mr. Levinson: I object to that as leading.

The Court: Overruled. Go ahead.

The Witness: From Mr. Thronsen.

Mr. Levinson: I move to strike it as hearsay.

(Testimony of Alvin E. Schultze.)

The Court: Well, it still seems so to me, but go on.

Q. (By Mr. Howard): Have you made efforts to obtain [45] longshoremen for discharging cargo on this vessel? A. We have.

Q. And on how many occasions?

A. Commencing with Monday, June 10, we placed orders daily.

Q. Have you been able to use those gangs?

A. We have not.

Q. Why not?

A. June 10 and 11 the gangs were not used inasmuch as the vessel was unable to reach the dock.

Q. Have you ordered gangs on subsequent dates?

A. On June 13 a definite order was given for gangs to commence work at 7 p.m. that night on the strength of information—on the strength of advice that the Foss Towboat Company earlier that afternoon would be in position to dock the vessel.

Q. Did the Foss Towboat Company carry out the order given to it for moving the vessel?

A. No, they did not.

Mr. Howard: That is all I have.

Mr. Vance: I have a couple of questions.

Cross Examination

Q. (By Mr. Vance): Mr. Schultze, how long have you been acting as Agent in the Pacific Coast maritime business? [46]

A. I never acted as an agent in Pacific Coast.

(Testimony of Alvin E. Schultze.)

Q. Whatever your relationship or business is, how long have you been in it?

A. 37 years, sir.

Q. And maybe I better then get what your relationship is again?

A. I am Assistant Operating Manager of Seatankers Incorporated, sir.

Q. You are with Seatankers Incorporated?

A. That is right, sir.

Q. And they have some connection with this vessel?

A. Well, we time chartered this vessel from the Nor-Gulf Steamship Company who in turn had chartered the vessel from the Panama Steamship Company.

Q. Seatankers Inc. did what, you chartered it?

A. We chartered the Nikolas.

Q. Yes?

A: From the North Atlantic and Gulf Steamship Company.

Q. From North Atlantic?

A. Who at the time had the vessel time chartered from the owners.

Q. And the owners are?

A. I can only guess at that. I haven't seen the owner's contract in asmuch as our immediafe contract is with the North Atlantic and Gulf Steamship Company. [47]

Q. What is your best guess then? You are in the business. A. I beg your pardon?

Q. Well, you verified the complaint, didn't you?

(Testimony of Alvin E. Schultze.)

A. That's right.

Q. And it says in here that Panama owns it. Does Panama own it?

Mr. Howard: The complaint says Panama "Ltd."

A. Panama.

Q. (By Mr. Vance): Does Panama Steamship Company own this as you verified under oath?

A. Panama Steamship Company.

Q. And Panama Steamship Company, Inc., is a corporation under the laws of what country, if you know? A. I don't know, sir.

Q. Seatankers, Inc. is a corporation organized under the laws of what country? A. Liberia.

Q. Pardon? A. Liberia.

Q. And the Atlantic and Gulf, they are incorporated or organized under the laws of what country? A. I am unable to tell you.

Q. Now, there are a couple of other corporations mentioned here; National Bulk Carriers, Inc. What does that have to do with this? [48]

A. National Bulk Carriers is an American Steamship Company of which Seatankers Incorporated is an affiliate.

Q. Is it a wholly owned or a subsidiary, or what about it?

A. To the best of my knowledge it is wholly owned.

Q. Wholly owned. And National Bulk Carriers, Inc., is an American corporation?

A. It is.

Q. And you are the Assistant Operating Man-

(Testimony of Alvin E. Schultze.)

ager of National Bulk Carriers, Inc., is that correct? A. That is correct, sir.

Q. What—and you work for Seatankers. Now, do you know of any relationship between North Atlantic and Gulf Steamship Company and the National Bulk Carriers, Inc.?

A. There is none to my knowledge.

Q. None?

A. No, other than the time charter owner from whom we time chartered the Nikolas.

Q. You don't know anything about the ownership of the company, whether it is the same?

A. It is not the same.

Q. You mentioned in your affidavit that you had been representing Trans-Sea Carriers, Inc. Who are they?

A. They are also an affiliate of the National Bulk Carriers.

Q. They are an affiliate of National Bulk Carriers? A. Yes. [49]

Q. What relationship do they have?

A. Wholly owned subsidiary.

Q. Wholly owned subsidiary?

A. To the best of my knowledge, yes.

Q. It is organized under the laws of what country?

A. That I don't have knowledge of. I can't give it to you.

Q. Does it have any connection with this vessel as a corporate entity of any kind that you know of?

A. Trans-Sea Carriers have in effect a contract

(Testimony of Alvin E. Schultze.)

of freightment with the Hooker Chemical Company for the transportation and delivery including the discharge of salt from Black Warrier Lagoon, Mexico, to Hooker Chemical Company plants.

Q. Now, I see that Trans-Sea Carriers Inc. has a contract of freightment with Seatankers who has the charter, is that right? A. That is correct.

Q. And they are both wholly owned subsidiaries of National Bulk Carriers?

A. To the best of my knowledge, yes.

Q. And then what did you say again their relationship was—Panama Steamship Company was?

A. Well, I will have to go down through the chain or channel of this thing. Trans-Sea Carriers have a contract [50] for freightment with Hooker Chemical Company to transport and deliver salt to their plants, one of which being at Tacoma. They have the Nikolas under a sub-time charter from the Seatankers Incorporated.

Q. Seatankers Incorporated?

A. Who have chartered the vessel from the North Atlantic and Gulf Steamship Company.

Q. Who in turn?

A. Who had previously already had the vessel under a time charter from Panama Steamship Company.

Q. And the Seatankers Inc. and the Trans-Sea Corporation are both wholly owned subsidiaries of National Bulk Carriers?

A. I said to the best of my knowledge.

(Testimony of Alvin E. Schultze.)

Q. And Panama Steamship Company is a wholly owned subsidiary of National Bulk Carriers?

A. No, it is not. No connection.

Q. I see. Now, the captain is hired by whom?

A. By Panama Steamship Company.

Q. By the Panama Steamship Company?

A. Yes.

Q. That is a Panamanian corporation?

A. I am informed by the captain that it is a corporation incorporated in Liberia.

Q. I am interested, sir, if you know who registered this [51] vessel under the Liberian register, the charter and sub-charter and time charters and sub-time charters or the owner?

A. I can only presume that Panama Steamship Company did.

Q. And they are not the owners, they are the charterers, is that correct?

A. They are the owners to the best of my knowledge.

Q. You presume they did? A. Yes.

Q. And they employed the Master, is that right?

A. According to our information. We have no connection with the company.

Q. Well, you have connection with—you represent National Bulk Carriers and Trans-Sea and somebody else? A. Seatankers.

Q. You represent all these other three. None of your companies pay this captain, is that right?

A. That is correct.

Q. So the captain would have to be paid either

(Testimony of Alvin E. Schultze.)

by the Panama Steamship Company or by National Bulk Carriers?

A. He couldn't be paid by anyone else other than Panama Steamship Company.

Q. All right. And who pays the crew besides the captain?

A. Again, Panama Steamship Company to the best of my knowledge. [52]

Q. Panama Steamship Company?

A. They being the owners, I presume the owners would pay the crew.

Q. Now, are you familiar, sir, with what is known as the—I meant to take this up with Mr. Swenson and I forgot it but maybe you know—do you know what the International Transport Federation is? A. Not intimately, no, sir.

Q. Well, do you know in a general way?

A. Purely by very vague hearsay knowledge up to this point.

Mr. Vance: That is all.

Mr. Levinson: I would like to ask a question.

Cross Examination

Q. (By Mr. Levinson): Mr. Schultze, when you called New York or wherever it was you called in connection with this dispute, you sought to ascertain the nature of the difficulties which are being reflected here, did you not, sir? A. We did.

Q. And those had something to do with the various associations or labor unions that the vessel operated under, did it not? A. It did.

(Testimony of Alvin E. Schultze.)

Q. And you talked to members of some American unions, did you not, when you telephoned New York? A. No, I did not. [53]

Q. That is, your office did and relayed the information to you? A. No.

Mr. Howard: They are objecting to hearsay, your Honor, and, of course, this witness couldn't testify as to who they talked to.

The Court: I will allow a little of it. Go ahead.

Q. (By Mr. Levinson): In your conversations with New York you related you had some questions concerning the union affiliations of this particular vessel, did you not? A. We did.

Q. And did those particular affiliations refer to some association of unions as well?

A. I was informed by Mr. Willoughby that the question of proper union affiliation would be a matter that would have to be decided upon by one Paul Hall who was the Secretary of the Seafarer's International Union in New York, and also one Einar Joe Hanson who he said represented the International Transport Federation in New York, and he gave me to understand it was between those two individuals that a decision would have to be reached by which he would be guided.

Q. And what did you advise Mr. Willoughby as to the [54] decision reached in New York which you were informed?

A. We called the owners, I speak now of the Panama Steamship Company, representatives in the United States, a company known as the West-

(Testimony of Alvin E. Schultze.)

ern Shipping Company in New York City, to determine what they had been able to accomplish in their dealings with either Paul Hall or Einar Joe Hanson. We were informed by the Western Shipping Company that the matter had been cleared at New York.

Q. Now, by that you understood there was some agreement between the Western Shipping Company representing the Panama Steamship Company, that there was some agreement between the Western Shipping Company as such representative, and these two individuals representing the other organization referred to as the "S.I.U." and the International Transport Federation; is that correct?

A. An agreement to the effect that this vessel was cleared as far as union affiliation was concerned.

Q. By "cleared" do you mean there was some meeting of the minds or agreement as to your vessel? A. That is the way I understood it.

Q. And that meeting of the minds or agreement concerned these individuals who represented the—or spoke for the International Transport Federation and the S.I.U.? A. That is correct. [55]

Q. And that the crew in Tacoma on the ship were therefore acting under such agreement, as far as you were informed, by the Western Transport Agency or whatever that firm was?

A. Well, to clarify your reference to "agreement," the only agreement that was involved in this transaction was whether this crew was acceptable

(Testimony of Alvin E. Schultze.)

or whether it wasn't acceptable, and the information received was that it was acceptable.

Q. Well, when you say it was "acceptable," it was acceptable to the standards as set up by the International Transport Federation, or at least you were so advised?

A. I understood it as such, but I am in no way able to say how the two individuals in New York reached that conclusion.

Q. I am not asking you as to the details, I am only asking you as to the ultimate fact. You were advised that these standards had been agreed upon by the individuals in New York and the Western Transport Corporation?

Mr. Howard: I would like to know what standards you are referring to.

Mr. Levinson: I don't know either, but neither does this witness.

Q. (By Mr. Levinson): I want to know if there was an agreement on standards? [56]

A. The information that I got from the Western Shipping company was simply that they had determined on inquiry that this vessel was cleared by the two individuals that I have previously mentioned.

Q. By the term "cleared" do you mean that they agreed—that these two individuals agreed that this vessel could proceed?

A. That's correct.

Q. And that it could proceed under the standards represented by these two individuals, whatever they may be?

(Testimony of Alvin E. Schultze.)

A. I don't know under what circumstances. All I know is they were satisfied with the status of the vessel.

Q. And do you know, then, it was by reason of some agreement with the International Transport Federation and the S.I.U.? Whatever the agreement is, you don't know? A. I don't know.

Q. But there was some agreement when you used the term "cleared"?

A. I can't do any more than repeat that upon inquiry on the part of the owner's agents they were informed that this vessel was cleared.

Q. They received that——

The Court: That was their term for it? That is what they told you?

The Witness: That was their term. [57]

Q. (By Mr. Levinson): That was obtained after discussion with these individuals?

A. That is correct.

Mr. Levinson: That is all.

The Court: That is all, sir.

Mr. Tanner: One question, sir.

The Court: Yes, Mr. Tanner.

Cross Examination

Q. (By Mr. Tanner): Mr. Schultze, calling your attention to longshore gangs that were ordered on June 10, 11, 12, and 13, were these gangs actually ordered on those days, sir?

A. The gangs were actually ordered in hope that before cancellation time matters would be cleared

(Testimony of Alvin E. Schultze.)

so that the vessel could work each of those days, except on the 13th, and that was a definite order, not a speculation order or a pick order. That was a definite order given for two gangs to go to work at 7 o'clock on the night of June 13 on the basis that the towboat company would carry the ship into the dock.

Q. Well, then, June 10, 11, and 12 were speculative orders, is that correct, sir, to make a distinction between definite orders and speculative orders? [58]

A. That would be the 10th and the 11th.

Q. And the gangs on Thursday the 13th were cancelled?

A. I will correct that day. I think that was the day of the 12th that that took place.

Q. In other words, sir, the I.B.L. in Tacoma has never refused you gangs?

A. They haven't refused to send us a gang, but on inquiry we were informed——

Q. They have never refused——

Mr. Howard: I would like to have the rest of the answer.

The Court: Go ahead.

A. (Continuing) ——but on inquiry we were informed if there was a picket line, and I am speaking in particular about the day that——

The Court: Make it plain who you were informed by. You use that term very frequently without telling us who informed you.

A. I was informed by Mr. Hanley of Griffith and Sprague.

(Testimony of Alvin E. Schultze.)

Q. (By Mr. Tanner): He is not a representative of the I.B.L. in Tacoma, is he?

A. He is with Griffith and Sprague Stevedores. I was informed by him when placing this definite order that if there was a picket line it would be very doubtful that their men would cross that line.

Q. But the I.B.L. has never refused you gangs in response to the order?

A. That could best be answered by Mr. Hanley.

Q. I am asking you.

The Court: Answer that directly. Has anybody on behalf of the I.B.L. directly refused to respond to any order for gangs? That is his question.

The Witness: No.

Mr. Tanner: That is all.

Mr. Howard: Just two or three questions.

Redirect Examination

Q. (By Mr. Howard): Mr. Schultze, is there any relationship between the National Bulk Carriers, Seatankers, Incorporated, and Trans-Sea Carriers, Inc., which you stated you represent, and the steamer Nikolas and the Panama Steamship Company, Ltd., other than through the time charter which you have described?

A. None whatsoever.

Q. Have the companies which you represent any further commitment to deliver salt cargoes to the Hooker Electro Chemical Company here at Tacoma? A. They do. [60]

Q. Mr. Schultze, do you have personal knowl-

(Testimony of Alvin E. Schultze.)

edge of any labor agreement between the owner and the Transport—the International Transport Federation or the steamer Nikolas and the International Trade Federation? A. I do not.

Q. In other words, the only information that formed the basis for your telephone calls to New York was what originated with Mr. Willoughby out here in Tacoma? A. Yes, sir.

Mr. Levinson: Objected to as argumentative, I think he answered that.

Mr. Howard: That is all.

Mr. Vance: Just one more question.

Recross Examination

Q. (By Mr. Vance): I want to clear up one thing. Was it your final conclusion that as far as you knew or your best guess would be, that Panama Steamship Company pays the crew?

A. I would only presume that to be the case. The owner usually does.

Q. Well, sometimes there are some of those charters where the charterer pays——

The Court: You don't know anything about it, though, as I understand it. You just merely [61] assume that the owner is paying the crew, but whether they do or not you don't know?

The Witness: No, sir.

The Court: He doesn't know anything about it, Mr. Vance.

Q. (By Mr. Vance): That is, neither one of those two corporations pay?

(Testimony of Alvin E. Schultze.)

A. Neither of them have anything to do with it.

Mr. Vance: That is all.

The Court: That is all, Mr. Schultze.

(Witness excused.)

GEORGE GENTES

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: George Gentes, G-e-n-t-e-s.

Direct Examination

Q. (By Mr. Howard): Your occupation, sir?

A. I work as manager of the Hooker Chemical Company at Tacoma. [62]

Q. At Tacoma? A. Yes.

Q. Mr. Gentes, have you received any indication or intimation that there would be any labor trouble at your plant if the steamer Nikolas came to berth at your dock? A. Yes, I have.

A. When did that originate?

A. Well, it was by a representative of another steamship company in the area.

Q. And about when did that originate?

A. Two weeks ago today.

Q. Before the arrival of the steamer Nikolas in Tacoma Harbor on June 10 did you have any communication with or from Mr. James Willoughby of the Marine Cooks and Stewards, AFL?

(Testimony of George Gentes.)

A. Yes.

Q. When was that?

A. A week ago yesterday. It would be on a Friday, Friday afternoon.

Q. And what was the nature of that conversation?

A. Mr. Willoughby placed a call for our traffic manager, I believe, and I think I had the call transferred to my office. His specific request initially was as to the arrival of the ship, arrival time of the ship, and, secondly, to request permission to come through our [63] plant in order to establish a picket line at the dock.

Q. To establish a picket line at your dock?

A. Yes.

Q. Hooker Chemical Company? A. Yes.

Q. Was that identified with the steamer Nikolas in any way? A. Yes.

Q. And how?

A. He explained that he had instructions from his international headquarters to picket any ship under a Liberian flag, I believe, and was not affiliated with this I.T.F. I was unfamiliar with it.

Q. Do you have employees at your plant who are members of other labor organizations than the Marine Cooks and Stewards, AFL? A. Yes.

Q. What unions do they belong to?

A. Chemical Workers and the Operating Engineers.

Q. Have you received any indications as to the possibility of refusal to work or a strike shut down

(Testimony of George Gentes.)

of your plant insofar as it would involve the employees who are members of the Chemical Workers or the Operating Engineers unions?

Mr. Vance: If your Honor please, I hate to object to that question, but I don't think it is [64] material to this case. As your Honor has pointed out before we have a very limited scope here.

The Court: It might be.

Mr. Vance: I seem to find it necessary to object to the form of the questions and the materiality and relevancy, hearsay.

The Court: No, I think this particular matter might conceivably be material. At least, I can't see that it is not, and in view of the nature of this type of hearing I will let him answer. Go ahead, Mr. Gentes.

A. Yes. When I was trying to develop the effect on our company's operations I did have a meeting with our union representatives of both unions, and they indicated to me that if this was a bona fide picket authorized picket in front of our plant gates, that they would feel they would have to honor the picket line. In the event the picket line was at the dock they felt that we could maintain plant operations.

Q. Mr. Gentes, in addition to the cargo of bulk salt which we understand is aboard the steamer Nikolas for delivery at your plant, did you have any other vessels scheduled to deliver salt at your plant in the current period? A. Yes.

Q. And the name of the ship? [65]

(Testimony of George Gentes.)

A. Olympic Pioneer.

Q. Was that scheduled to arrive before or after the steamer Nikolas? A. After.

Q. Which would have had priority at the berth?

A. The Nikolas would have priority at the berth had it arrived and been able to come into the dock.

Q. Were you able to provide a berth for the steamer Nikolas after notification of the arrival and tender of the ship was made to you?

A. I felt that under the provisions of our contract that we did not have to provide berth.

Q. And for what reason?

A. The enforcement clause and labor difficulties and trouble, either direct or indirect.

Q. In other words, you apprehended there would be labor difficulties?

A. Yes, very definitely.

Q. Did that include the possibility of a shut down of your plant? A. That is correct.

Q. Due to a picket line being established?

A. That is correct.

Q. Incidentally, can you give us some very quick idea of what would be involved in the event there was a shut [66] down of your plant as far as cost and damage is concerned?

Mr. Levinson: That is objected to as not material. They are not a party to the proceedings.

Mr. Howard: It very definitely is material, your Honor, in the type of relief we are seeking here.

The Court: It is possible that the contract might be liable for that. That is the theory that Judge

(Testimony of George Gentes.)

Fee, you will recall, imposed a very heavy penalty on Montgomery Ward in Portland on that very ground. Overruled.

Mr. Vance: This is on an injunction.

The Court: That may bear upon it. I don't know that it does, but it is possible that it does. That is all I can do now. Overruled. Go ahead. Just briefly, what effect would it have on the plant?

The Witness: We have never shut our plant down, so it is hard to say what the total effect would be. In dollars I wouldn't be able to give any account of that, of course, but it is a very serious problem to shut our plant down and starting it again. We have six hundred some-odd cells which require attendance individually.

Q. (By Mr. Howard): You are unable to even estimate that in dollars? [67]

A. I would hesitate to do so now. We could do it.

The Court: You are operating six hundred cells continuously 24 hours a day with electric currents through them, and so on?

The Witness: Yes.

Mr. Howard: That is all I have.

Mr. Levinson: No questions.

Mr. Vance: No questions.

The Court: I believe that is all, Mr. Gentes. You are excused.

(Witness excused.)

WILLIAM JOHN HAMBLEY

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: William John Hambley, H-a-m-b-l-e-y.

Direct Examination

Q. (By Mr. Howard): Your occupation, Mr. Hambley?

A. Operating Manager for Griffith and Sprague.

Q. Have you had any connection with the ordering of gangs to discharge cargo of bulk salt from the steamer Nikolas at the Hooker Chemical plant in Tacoma? A. Yes.

Q. Can you state for us when those gangs were ordered and whether they were able to carry out the orders?

A. Well, the first gangs were ordered to call a haul at 10 a.m., Monday, June 10. They had to be cancelled at 10, and they were cancelled at 9:55 and an order placed for two gangs for that night and three for the following morning, Tuesday morning. They were also cancelled out and gangs put on call at 10 a.m. Tuesday.

Q. What was the reason they were cancelled out?

A. Because the ship wasn't at the dock.

Q. And where any gangs ordered subsequent to that time?

A. Then on Tuesday night no gangs were or-

(Testimony of William John Hambley.)

dered, but Wednesday morning three gangs were ordered for 8 a.m.

Q. And were those gangs able to work?

A. No, they were cancelled out and placed on call again at 10 a.m. Wednesday.

Q. And were any further gangs ordered?

A. Then we ordered two gangs for Wednesday at 7 p.m. and three for 8 a.m. Thursday.

Q. And were you able to use those gangs?

A. The two gangs that were ordered for 7 p.m. Thursday night [69] went down to work but didn't go to work on account of pickets and the ship wasn't at the dock.

Q. They did not work on account of pickets?

A. And the ship wasn't at the berth.

Q. Where were those pickets, do you know?

A. No.

Q. Mr. Hambley, have you as the Operating Manager of Griffith and Sprague Steamship Company received any indication as to whether longshoremen and gangs you were ordering would be willing to work the steamer Nikolas?

A. No. I knew that——

Mr. Levinson: Objected as not responsive.

The Court: He said no.

The Witness: If they were ordered to go——

The Court: The question is answered.

Q. (By Mr. Howard): Have you received any indication whether longshoremen ordered on these gangs that you mentioned, or gangs that might be subsequently ordered for the steamer Nikolas,

(Testimony of William John Hambley.)

would cross a picket line if there was one established around the steamer Nikolas?

A. I talked to Mr. Connell of the I.B.L. and told him that we were placing an order for two gangs for 7 p.m. on Wednesday night and if there was a picket line there, would they go through. [70]

Q. What did he say?

A. He said if it was a legitimate line they wouldn't go through.

Mr. Howard: That is all I have.

Cross Examination

Q. (By Mr. Vance): That wasn't any surprise to you either, was it? A. No, sir.

Mr. Vance: That is all.

Mr. Levinson: That is all.

Mr. Poth: I have a couple of questions.

Cross Examination

Q. (By Mr. Poth): Mr. Hambley, you mentioned longshoremen. To what longshoremen were you referring?

A. I.B.L. hauling in Tacoma.

Q. All in Tacoma?

A. Yes. That is the only place they placed any orders.

Q. And to your knowledge, what are the longshoremen in Seattle affiliated with?

A. I.L.W.U.

Q. Is that Local 19? A. Yes, sir. [71]

Q. And to your further knowledge, has the offi-

(Testimony of William John Hambley.)

cer or the membership of Local 19, I.L.W.U., in Seattle been in any way connected with this trouble or dispute? A. Not to my knowledge.

Q. Are you acquainted with William Gettings?

A. Am I acquainted with him?

Q. Yes. A. Yes.

Q. Is he a member or officer of Local 19 of the International Longshoremen's and Warehousemen's Union in Seattle?

A. He is Regional Director. That is all I know.

Q. He is not a member or officer of Local 19?

A. Not elected or appointed by any of the membership.

Q. How is he elected, or how does he get his job?

A. That I couldn't answer.

Mr. Poth: No further questions.

Cross Examination

Q. (By Mr. Tanner): Mr. Hambley, the very nature of longshore work, sir, is to load and unload ships, is that correct? Is that your understanding of it? A. Yes.

Q. I believe in one of your statements in response to [72] counsel's questions you said that on the night of June 12 they did not work on account of pickets, isn't that true, sir, that there was no work provided? A. That was also true.

Q. Has any member or has any representative of the I.B.L. in Tacoma, sir, ever indicated to you that they were ready to do other than abide by their contract with waterfront employers? A. No.

Mr. Tanner: That is all.

The Court: Did you have something, Mr. Levinson?

Mr. Levinson: No, sir.

The Court: That is all.

(Witness excused.)

WEDELL A. BERG

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Wedell A. Berg, B-e-r-g. [73]

Direct Examination

Q. (By Mr. Howard): What is your occupation, Mr. Berg?

A. I am Chief Dispatcher of Foss Launch and Tug Company.

Q. Calling your attention to June 12, 1957, I will ask you if while you were on duty as dispatcher for the Foss Launch and Tug Company in Tacoma you had any request to provide tug service to the steamer Nikolas?

A. Yes. We had orders for moving the steamer Nikolas in at 5 p.m. furnishing tug and line men at the time.

Q. And did you assign a tug to perform that service? A. Yes, we did.

Q. Now, after doing so, Mr. Berg, did you receive any communication from any representative

(Testimony of Wedell A. Berg.)

of any union concerning the movement of the steamer Nikolas?

A. Yes, I received a call from Captain Fox of the Inland Boatmen's Masters, Mates and Pilots stating that it was a hot ship and there was a picket line or a picket boat, on the steamer and for us not to move the steamer in.

Q. Was the tug Bryn Foss able to perform the assignments which had been given to it?

A. We got this call for the tug before the tug Bryn Foss left the dock.

Q. Did the tug Bryn Foss or any other tug perform the [74] assignment of moving the ship into the dock? A. No.

Q. And why not?

A. After we received the call from Captain Fox there was considerable telephone calling going on and it was decided that the ship would be moved to a better anchorage.

Q. Did the person who placed the order for movement of the ship to the dock cancel the order?

A. Yes. It was changed to move to a better anchorage.

Q. Was that in effect, Mr. Berg, a subsequent request to move the ship to a safer anchorage after you were unable to move it into the dock?

A. That is correct.

Q. So that you still had a request to move it into the dock if it was possible to do so? A. Yes.

Mr. Howard: That is all I have.

(Testimony of Wedell A. Berg.)

Cross Examination

Q. (By Mr. Vance): You moved the vessel to safe anchorage with no difficulty, did you not?

A. We did, yes.

Mr. Vance: That is all. [75]

The Court: That is all, Mr. Berg.

(Witness excused.)

Mr. Howard: That concludes the witnesses that will be called by the applicants.

The Court: Do you have any proof?

Mr. Vance: The Defendant James O. Willoughby and the other Defendants for whom I appear will rest on the affidavit of Mr. Willoughby just for the purpose of this proceedings.

The Court: Yes.

Mr. Poth: Your Honor, I would like to move at this time for dismissal. I am preserving, of course, my special appearance.

The Court: Well, there is a serious question about your being served, of course. That is quite apparent. I wouldn't dismiss on that ground. I might consider you not before me, but I wouldn't dismiss the proceedings because presumably the service could be modified. However, it is quite apparent on the face of it there is inadequate service on Mr. Poth's client, at least as far as this proceedings is concerned. Do you agree to that?

Mr. Poth: The proof in no way has implicated us. [76]

The Court: That is true. However, I wouldn't dismiss the action. I merely will consider that you

are not here. That is all. I think we will take a few minutes recess at this time.

(Thereupon a short recess was taken.)

The Court: You may proceed.

Mr. Vance: May it please the Court, I overlooked something and I would like to put on a witness for a couple of short questions.

The Court: Certainly.

Mr. Vance: Call Mr. Willoughby.

JAMES O. WILLOUGHBY

one of the Defendants herein, called as a witness on his own behalf, having been previously sworn, resumed the stand, and testified further as follows:

Direct Examination

Q. (By Mr. Vance): Mr. Willoughby, you are the same Mr. Willoughby that was sworn before?

A. Yes.

Q. When you first went aboard the vessel and talked to the captain did you have any conversation with him about his men? [77]

A. I asked him if his men aboard the ship, the crew and himself, were members of the International Transport Workers.

Q. Do you mean the International Transport Federation?

A. International Transport Federation.

Q. And the International Transport Federation is what?

A. A world-wide organization of maritime workers.

(Testimony of James O. Willoughby.)

Q. And what, if any, agreement is there by organizations connected with the International Transport Federation?

Mr. Howard: I object to that.

Mr. Vance: All right. I will withdraw the question. It is in the affidavit.

Q. (By Mr. Vance): What did he respond?

A. He told me that they were members—in so many words, that they were affiliated with the I.T.F. and showed me the evidence that has been submitted here.

Q. Exhibit 3?

A. That is it. And I copied the names of the unions.

Q. And did you make any efforts to ascertain whether or not the wages paid the members of the crew were in accordance with the prevailing standards in this area? A. I did.

Q. Were they?

A. They were far substandard to the wages paid in this area.

Q. Is your organization a member of the International [78] Trade Federation? A. Yes.

Q. Transport Federation? A. They are.

Mr. Vance: That is all I have.

Cross Examination

Q. (By Mr. Howard): One question. I take it that your ascertainment as to wages is not in accordance with wages paid to similar workers in this

(Testimony of James O. Willoughby.)

area referring to wages paid to Marine Cooks and Stewards?

A. The crew generally is what I am talking about.

Q. And that would not apply, for example, on a Japanese ship, would it?

A. If they were members of the I.T.F. and working in this area, then they would by virtue of the agreement of the I.T.F. bring their wages up while they were working in a certain area.

Q. By the way, do you have a copy of the I.T.F. so-called agreement? A. No, I don't.

Q. Have you ever examined it?

A. Yes, I have examined it on some point when we have our conventions. [79]

Q. As a matter of fact, there is no I.T.F. agreement, is there, Mr. Willoughby?

A. Well, oh, yes, there is. In fact, we had a convention only four months ago in Geneva.

The Court: No, he is talking about an agreement.

Q. (By Mr. Howard): I am asking you if there is an I.T.F. agreement.

A. I don't know. If you want to term it as an agreement if we should apply the word "agreement" to it.

Q. Can you produce an I.T.F. agreement?

A. No, I can t.

Mr. Howard: That is all.

The Court: That is all, Mr. Willoughby.

(Witness excused.)

(Thereupon oral argument of counsel was rendered following which the case was continued to Monday, June 17, 1957.) [80]

(Thereupon at 10 o'clock a.m., Monday, June 17, 1957, the following proceedings were had, to wit):

The Court: Good morning, gentlemen.

Mr. Poth: I have here Mr. Gettings, and I would like to, if possible, put hi mon the stand to establish two short points, one being the failure of service on Local 19 and also the lack of participation by the I.L.W.U. in this dispute.

The Court: I had rather taken that as being sufficiently established without his testimony on Saturday, but if you would like to formally fill the record, you may do so.

BILL GETTINGS

called as a witness on behalf of the Defendant International Longshoremen's & Warehousemen's Union, Local 19, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Bill Gettings, G-e-t-t-i-n-g-s. [81]

Direct Examination

Q. (By Mr. Poth): Where do you live, sir?

A. 1526½ East Howell, Seattle.

Q. What is your occupation?

A. Northwest Regional Director of International Longshoremen & Warehousemen's Union.

(Testimony of Bill Gettings.)

Q. Are you a member of any particular Local?

A. Local 10 in San Francisco of the International Longshoremen & Warehousemen's Union.

Q. Are you a member or have you been a member, an officer, agent, or representative in any capacity, or have you ever been an officer, agent, or representative in any capacity of Local 19 of the International Longshoremen & Warehousemen's Union? A. No.

Q. What are the functions of your position as International Representative?

A. Well, I represent the International Union in Oregon, Washington, British Columbia, and Alaska, and all administrative matters connected with the International and Local unions.

Q. How is Local 19 constituted?

A. Well, it is in the International Longshoremen's Union who elect their own officers and run their own business [82] as long as it does not conflict with the International Constitution of the International Union.

Q. Has Local 19 always been affiliated with the International Longshoremen and Warehousemen's Union? A. Yes.

Q. Well, was it ever at any time a member of any other international organization?

A. Yes. Before 1957, I believe. I don't know the exact dates, but a change took place. It used to be a Local of the International Longshoremen's Association.

(Testimony of Bill Gettings.)

Q. In other words, it has changed its affiliation from the I.L.A. to the I.L.W.U., is that correct?

A. Yes.

Q. And you are a representative of the I.L.W.U. International? A. Yes.

Q. Now, in regards to this particular dispute, you have since heard about it since last Friday, have you not? A. Yes.

Q. To your knowledge, has there been any participation in any manner whatsoever or any way whatsoever upon the part of International Longshoremen's & Warehousemen's Union, the International, or any of its affiliates or Locals insofar as you know? A. No. [83]

Mr. Poth: No further questions.

Cross Examination

Q. (By Mr. Howard): Does your jurisdiction as an officer or representative of the International include some supervision over Local 19?

A. Not as far as the operation of the Local is concerned. If something should happen that is in violation of the International Constitution and their obligations to the International, then it is my duty to bring it to the attention of the proper authorities within the union.

Q. By the way, who is the head of Local 19 now?

A. At the present time the president is a man named Jack Price, P-r-i-c-e.

Q. And who is the business agent?

(Testimony of Bill Gettings.)

A. One Mr. Fred Richardson.

Mr. Howard: That is all I have.

The Court: That is all, Mr. Gettings. You are excused.

(Witness excused.)

The Court: Is there anything further, Mr. Poth?

Mr. Poth: Nothing, your Honor. I would like to move at this time that we be dismissed [84] from any further connection with these proceedings.

Mr. Howard: I would oppose a dismissal of the defendant.

The Court: I will rule the same as I did on Saturday. I am not dismissing you out of the case, but as far as this proceedings is concerned you are not here.

Mr. Poth: Thank you.

(Thereupon oral argument of counsel was rendered following which the Court rendered decision as follows):

The Court: In view of the extended hearing which has been had and the taking of testimony at some length, I am going to treat this as a hearing for temporary injunction rather than for the limited purpose of restraining order only. If anyone objects to that I will be glad to hear from them later about it. I believe that I am authorized to do that, and I think under the circumstances, considering the rather extended range of testimony taken and argument given, that there would be no purpose

in merely setting the matter down now for further hearing on temporary injunction. [85]

While the particular issue submitted in this proceedings is quite narrow, and the specific circumstances of limited importance, that is, whether or not the Nikolas be permitted to discharge at the Port of Tacoma, the basic considerations involved are of vast significance and importance not merely to the particular parties but to the nation as well. The well being and security of the United States in a particularly critical area of national concern at the present stage of world history, namely, in the field of international commerce, comity, and law, may be involved. Of course, the judiciary may only consider such questions to the extent of the jurisdiction of the court.

The resentment of the defendants and their members at what they regard as unfair competition, as it were, and their efforts to remove it, are quite understandable and certainly not without strongly sympathetic points. If the issue before me were to be judged on that basis, this court would have little inclination to consider at any length interfering with the controversy on one side or the other. However, rightly or wrongly, I am fully satisfied that far broader concerns [86] are involved here. I must keep in mind that he who sits in this place must have the interests of the nation in mind and treat the controversies that come here, where the issues permit, on a national or international basis as the subject matter indicates.

It is regrettable that a District Judge rarely has the adequate time and the benefit of extended research and full briefing that others in higher echelons of the judiciary enjoy, to utilize in solving the important questions that are presented usually, as in the present instance, on short notice and in emergent circumstances. A District Judge, generally, as in this case, must decide important questions with only limited time for research and contemplation by either counsel or the court. Nevertheless, one must do his best in whatever situation he finds himself and that I hope I may do on this occasion.

None of the cited cases, excepting only Benz and Lauritzen, were concerned either directly or indirectly with international commerce, obligations, or law. All of the cases cited were concerned solely with local or national interests and law as distinguished from those international [87] in character. The reasoning of Judge Solomon, as reported to me by Mr. Mosser in the argument this morning, in granting the restraining order and later temporary injunction in the Benz case, is quite persuasive, although, of course, not controlling. I myself think that it is extremely doubtful whether the Norris-LaGuardia Act is applicable to cases of interference in a United States port with the lawful performance of a lawful contract by a foreign vessel and crew of a friendly foreign nation. While I have had no opportunity to review the history of that Act, I would be tremendously surprised to find that the Congress even considered or discussed whether the

Act was to be applicable in the field of international law and commerce. I think it unnecessary to dilate at length upon the reasoning by which I reach the conclusion that Norris-LaGuardia is not applicable, except only to say that I have reached the conclusion after very carefully reading and considering each of the cases cited.

If I could stop at the point of my doubt, I would be obliged to deny the relief sought because if the authority to issue a restraining order and injunctive relief of any character be doubtful, it [88] must not be exercised. I hope I have the intellectual integrity to fully follow that long established, traditional concept of Federal Courts. Down through the years Federal Courts have persistently refused to take jurisdiction or exercise it where existence of the jurisdiction was in doubt. I myself frequently have declined to exercise jurisdiction because of reasonable doubt of having it.

Thus, I say that if I need go no further than the present point: namely, to indicate my doubt of the applicability of the Norris-LaGuardia Act, there would be an end of it. I go further, however, because in my judgment interference in a United States port with the lawful performance of a lawful contract by a foreign vessel and crew of a friendly foreign power, is conduct which amounts to an unlawful interference with international commerce and with the obligations of the nation under international law and the comity of nations.

Thus, I believe that the conduct here complained

of and shown by the evidence submitted on this hearing, falls fully within the limitations stated in Section 107 of the Norris-LaGuardia Act [89] in that the conduct is unlawful and that there is ample threat that it will be continued unless restrained. I am satisfied that substantial and irreparable injury to foreign nationals will follow; that the injury to the complainants without the relief now sought will be far greater than the injury to the defendants if the relief be granted, and that there is no adequate remedy at law.

I reach this conclusion in essence for the reason, as indicated during the argument when I questioned Mr. Vance, that the philosophy of all these cases dealing with this particular aspect of Norris-LaGuardia are to the effect that lawful conduct, conduct which in and of itself is not unlawful, can not be restrained by a Federal Court under Norris-LaGuardia regardless of how evil the purpose may be for which that conduct is employed. On the other hand, if unlawful conduct be employed for the finest and most lawful purpose in the world, and the elements stated in Section 107 be present, it may be restrained under the Norris-LaGuardia Act.

Now, the point of our case is that because we have international obligations involved here of paramount importance to the welfare and security [90] of the nation, particularly at this critical time in world history, the interference with wholly lawful activities of the commerce of a friendly foreign power are unlawful, and, therefore, regardless of how well founded or grounded the reasons for employing that

unlawful conduct, the court has the power and the duty to restrain it.

As I see it, there is no case thus far in which a Federal appellate court, either in a Circuit or the United States Supreme Court, has squarely reviewed this question. The closest approach is 71 Federal 2d, 284, Levering vs. Norin, but there, international considerations were not involved. It was purely a local dispute. The injunctive relief granted in the Benz case clearly was not reviewed either by the Circuit or by the United States Supreme Court. In this light of this proceeding I see why the Circuit Court was at such pains to indicate that they were not reviewing it and why Judge Pope wrote an opinion emphatically indicating that that phase of the case was not being reviewed.

So the only authority, if it be an authority, that we have precisely and squarely on our issue is Judge Solomon's decision in the Reviera case. [91] As Mr. Levinson pointed out in argument, there may be some distinction between that case and the present case due to the fact that the disputants there were all foreigners. I am inclined to think that is a distinction without a difference, but I do not regard it as necessary to decision of the present case to concern myself with that.

In my judgment, the conduct complained of must be restrained as an unlawful interference with international commerce. It is so ordered.

(Thereupon a short recess was taken.)

Mr. Vance: May it please the Court, regarding this Panama Steamship Company case, we are confronted with a difficult problem concerning a review of your Honor's ruling, and, of course, in the absence of some word in some way to the contrary, the only way to keep the case alive is an obvious one. We understand in conversation that perhaps counsel is willing to stipulate in open court that as a part of the findings it may be found that the vessel not only will make this trip but likewise in other similar trips into this port, and I would like to ask counsel in open court now if that may be stipulated to in the findings.

Mr. Levinson: Otherwise it would be moot again.

The Court: If there is any way I can cooperate to make it reviewable, I will be very happy to do it.

Mr. Howard: If the Court please, it is my understanding that either this ship or other similar foreign flagships——

The Court: Under similar conditions.

Mr. Howard: Under similar conditions will be making calls.

Mr. Levinson: Hadn't we better limit it to this defendant's ships—plaintiff's ships, I mean?

Mr. Howard: That might be true, Mr. Levinson, as far as one of the plaintiffs is concerned but not as far as all of them.

Mr. Vance: There you are, your Hoonr. I take it that the Court's injunction will go no broader than the plaintiffs in the action, and if they reach in the other pocket and pull out another one of

those corporations, your Honor has heard the evidence.

The Court: Well, does that make any difference as far as getting a review of the matter is concerned? What you want to find out is what the Circuit Court and the United States Supreme Court [93] are going to say about. If you get it said with respect of any single plaintiff, isn't that enough?

Mr. Vance: If this plaintiff takes this vessel out of the harbor, which he will do, under your Honor's ruling, then, the thing is moot unless there is some showing that this plaintiff——

The Court: He said one or more of the plaintiffs. I think you misunderstood him.

Mr. Vance: I am sorry. It may be agreed, then, as far as the Court's findings are concerned, it will be one or more of the plaintiffs.

The Court: Do you want to make that a part of the record just by this statement here?

Mr. Vance: By the stipulation and the finding of the Court, then.

The Court: So found.

(Thereupon the Court recessed and reconvened the following day, Tuesday, June 17, 1957, at 2 o'clock p.m., and the following proceedings were had, to-wit):

The Court: Good afternoon, gentlemen. I asked you to be on hand today for the consideration of entering the Findings, Conclusions, and Temporary Injunction. Because of developments arising after you departed yesterday I asked my Law Clerk, Mr.

Hilpert, to telephone each of you and advise [94] you of the substance of what those matters were.

Now, in brief, in rendering the decision yesterday I was in error in at least two particulars, possibly because the particular matters were not previously discussed in the argument nor given adequate consideration. In any case, inquiry was made by counsel at the very end of the ruling, and after it had been announced it raised a question in my mind with respect of two phases of the matter. We immediately looked into those phases of it and became satisfied that the Court was in error in those particulars.

Now, the particulars are, first, that I off-hand had thought that subsection (c) of Section 107 of the Norris-LaGuardia Act was concerned only with physical property and not intangible property and property rights. In checking on that I found that in two cases, at least, it has been held to the contrary; name, Tri-plex Shoe Company vs. Cantor, 25 Federal Supplement, 996, a District Court decision in 1939 by the Pennsylvania District Court, and Knapp-Monarch Company vs. Anderson, 7 Federal Supplement, 332, an Illinois District Court decision in 1935. Both of those cases held that the term "property" as used in 107(c) means [95] not only tangible property and physical property, but also the right or use or enjoyment of property and the right to pursue a business or trade, and so on.

Now, the second error of yesterday was in my considering that the temporary injunction should

restrain future conduct by some of the other parties. As I recall, that came up in connection with a question by Mr. Levinson at the very end of the hearing, and it was put in somewhat of an offhand manner just as I was leaving the bench. I mistakenly stated that the injunction should include all parties with respect of future possible actions. Of course, when we looked at the Norris-LaGuardia Act and examined subsection 107(e), it is quite apparent that the injunction should not restrain persons or organizations not shown to have actively participated in the conduct to be restrained. Accordingly, any injunction here should be modified.

Now, with respect of the first point; namely, that intangible property and property rights are involved in sub-section 107(e) as well as physical property, it puts a different light on that section in my mind and convinces me that the [96] requirement of that sub-section is met by the proof in this case; namely, that there has been an inability and is an inability on the part of local or state or national authorities, public officers, to provide protection for the rights violated, and accordingly, I propose to so find.

I notice in the Findings, 22, that it is put in this language, that is, proposed Finding 22, "Public officers charged with the duty to protect plaintiff property are unable to furnish adequate protection as shown by the lack of evidence of any such action by such authorities." I do not object to that statement because I think it is correct, and there is some inference that might be drawn from the fact that

no objection had been taken during that period of time since June 10, that the Nikolas has been in the harbor undocked.

It seems to me that there should be added to that a finding to this effect, "That no public officer, either local, state, or national, is charged with the duty or in fact authorized to provide protection of the character needed here by preventing the activities of the Will-O-Bee in the harbor," and accordingly, I think that [97] thought in appropriate language should be included in that finding.

Now, I would be glad to hear from either or both of you with respect to the form and content of the Findings, Conclusions, and Temporary Injunction.

Mr. Howard: If the Court please, we have submitted these with the thought that the Court might desire to consider the alternatives either by the first set that was drawn or the—that is, as to page 7 and 7a, or the alternative on page 7. Now, actually, I note that on the alternative page 7 we did not include the finding as far as the public officers.

The Court: I think it should be included, and it should be included as I have indicated.

Mr. Vance: You had that, Mr. Howard. You left out 23 which is the dispute between—isn't that correct?

Mr. Howard: No, I think we left it out and substituted another, counsel, is what it amounts to.

The Court: The original that I have which I am looking at ends at line 13 with the word "authority." Then, it starts again at page 27, [98] "Where-

upon the Court makes the following," and so on and so forth.

Mr. Vance: Maybe if I went ahead with the objections, I believe you brought a secretary with you to make these corrections?

Mr. Howard: No, I did not.

The Court: You may use my secretary if they are not too extended, because I know you both desire to get it entered without the necessity of your coming over here again.

Mr. Vance: And we under stipulation with counsel, until the settlement, we have ceased picketing, and there will be no difficulty with that particular thing, and we might get our objections settled.

The Court: All right. Do you have in mind what I propose to add to 22, do you? In other words, my thought about it is simply is this, that while I find the conduct of the Will-O-Bee unlawful under the international obligations of the nations, there is no city ordinance, state statute, or for all that I know, any Federal statute that prohibits a boat from cruising around in the harbor with a sign on it.

Mr. Vance: I think I understand your Honor's [99] theory on that.

The Court: I don't expect you to agree with it, but that is my thought about it.

Mr. Vance: I was wondering if your Honor would care to make this further finding, then, on the same paragraph, that there has been no fraud or any violence or threat thereof by the defendants? It is my theory that the Court's only power

is an injunction under the Norris-LaGuardia Act and under that Section 107(e), is to restrain fraud or violence.

The Court: If you mean in the sense of physical violence, there is no problem about that. I will so find. But whether or no the coasting of a boat back and forth in front of another boat with a sign on it under these particular circumstances comes within the definition of violence in the sense that it prohibits the ship from proceeding, and so on, certainly nobody has been assaulted or anything of that kind, nor even threatened with it, nor has there been any indication that it would happen, and I am certain it wouldn't. If you gentlemen can get together some appropriate language to that effect, I am certain you would have no [100] objection to that being done.

Mr. Vance: My suggestion would be and it would read, "There has been no fraud or violence or threat thereof by the defendant."

The Court: Yes, I would think so.

Mr. Vance: To go back, and I want to say in court that I am appreciative of counsel's efforts in drafting these findings. I think counsel has made a commendable effort to draft them along the lines of the issues as framed and drawn and ruled upon.

Referring to page 3, your Honor—we have no objection to page 2. Page 3, line 22, I believe the word "lawful" should be stricken. I do not believe saying it is a "lawful charter" is a finding of fact, and I think all *this* is needed is "pursuant to charter and enfreightment contract" is sufficient.

The Court: Of course, I said that in words to that effect.

Mr. Vance: It would be a conclusion of law, your Honor, that this was a "lawful" contract, and so forth. I think that it is just pursuant to charter and enfreightment contract." I think the word "lawful" there—— [101]

The Court: Well, I can see your point. On the other hand, in some particulars it is a fact finding.

Mr. Vance: We didn't produce any evidence to challenge it at this proceedings, and I think that for the Court to so find as a matter of fact here that it was lawful——

The Court: Well, it was lawful, and whether that should technically be in a finding or a conclusion, I don't know, but I can't see any possible harm that would come from leaving it there. Your point may be technically well taken because of the legal characteristics of that word, but, on the other hand, it may well be that it is a fact finding as well. I think I will leave it there.

Mr. Vance: Very well, your Honor.

Then, on the next page, page 4, the only objection we have there is article 8, once again for the same reason but perhaps a little stronger situation. It reads now, "Promptly after having so arrived, said steamship became lawfully entitled to discharge and deliver said cargo," which, of course, is a pure conclusion of law.

The following is a finding of fact, "The [102] remainder having then been cleared and passed by United States Immigration." I should think

that ought to be changed. The words "became lawfully entitled" have no place there, I think, here, and should be changed to the words, "attempted to discharge and deliver," and so on, or some other words. I do not believe that the words, "became lawfully entitled to discharge" are not in issue in this case and should not be made a part of these findings of fact.

The Court: Well, that is what I found and held, that they did become lawfully entitled to discharge. I think I will leave it.

Mr. Vance: Very well, your Honor. I have two more objections which I want to make for the record which are of the same nature.

On page 5, Finding XV, the word "unlawful" again appears. I object to that and I think it should just read as it reads without the word "unlawful."

The Court: Same ruling. I will leave it in.

Mr. Vance: Lines 13 and 14. I object to the word "right" being used, and particularly the words, "the right of plaintiffs to carry out international—" and so forth. I think if it [103] is a finding of fact it should state particularly the ability of plaintiffs to carry out an international voyage other than the word "right."

The Court: I think I will let it stand as drafted.

Mr. Vance: Line 15, I object to the words "lawful" again. The vessel registered by a friendly, foreign nation would be a finding of fact.

The Court: I will allow it to stand.

Mr. Vance: Now, if your Honor, there are a number of changes—only two, I guess, two in the

findings and one in the decree. Section XVI of the Findings, finding XVI, that is the finding based upon stipulation of counsel entered into after the close of the hearing and after the court announced its decision. We think that there should be added two words, and I haven't had an opportunity to discuss this with counsel——

The Court: Maybe he will agree to it.

Mr. Vance: After the words "Puget Sound area" we propose to add, "and to the Hooker Electro-Chemical plant in Tacoma," and after the word "vessel"—— [104]

The Court: Just a moment. What is your opinion of that, Mr. Howard?

Mr. Howard: I don't know, your Honor. I know that they—for all that I know they might be coming into other plants other than Hooker Chemical.

The Court: Do you know that they are coming to Hooker?

Mr. Howard: Yes, I do.

The Court: Then put it in if you want to make the best opportunity for you to get a review of this that we reasonably can.

Mr. Vance: After the word "vessels" we would like to have added, "Owned, operated, or to be chartered by plaintiffs," or some of them, just to make clear that — you see, because they talk about——

The Court: That was a point we talked about yesterday.

Mr. Howard: No objection.

The Court: All right, add it.

Mr. Vance: Then, in the same line to clarify that 19, line 28, after the words "threaten to picket the same," to add, "and other vessels of the plaintiffs similarly engaged," as [105] referred to in finding XVI above.

The Court: I see no reason why that shouldn't be included, do you?

Mr. Howard: No objection, your Honor.

The Court: Include it.

Mr. Vance: In order to make the decree accord.

The Court: That is just a matter of words, isn't it?

Mr. Vance: Just a matter of adding some words to make the decree, because the decree only bars us from picketing the Nikolas and I think that the decree should reflect the findings and the intention of this Court, the intention of the plaintiffs to secure relief against this type of picketing on behalf of these plaintiffs by this defendant.

The Court: The only thing is, do we run afoul to that Section (a)?

Mr. Vance: We are restricting it to these parties.

The Court: I don't offhand see any reason why that can't be done that way. It doesn't seem to foul Section (a) in any way. Do you see any objection to that, gentlemen? [106]

Mr. Mosser: No, your Honor.

The Court: Add that, then, Mr. Vance.

Mr. Vance: I will discuss that with counsel, your Honor.

The Court: You won't have any trouble getting that language.

Mr. Vance: Now, then, in connection with our theory of the case, I would like to have a finding added which I believe is undisputed in the evidence, and I think it would appropriately follow finding XIX, to fit between XIX and XX. I would like to add this finding by the Court, "As a result of the engagement in this trade by the plaintiffs in vessels of foreign registry——"

The Court: This is a paragraph to be inserted?

Mr. Vance: "As a result of the engagement in this trade by the plaintiffs in vessels of foreign registry, vessels of American registry and operated under contract with the defendant union, have lost or will lose such business with resultant loss of employment to defendants' members."

Mr. Mosser: Your Honor, on the last one that Mr. Vance proposed, we have no objection to [107] that. I would like to suggest that on the finding he requested with regard to fraud and violence, that it read, "There has been no fraud or physical violence to persons or tangible property or threat thereof," in order to protect your Honor's theory.

The Court: I am sure Mr. Vance would agree that that is what I tried to say without his agreeing to my being right in so saying it.

All right, I believe that covers all the matters.

Recess subject to call.

(Thereupon the Court recessed.) [108]

[Endorsed]: Filed July 6, 1957.

[Endorsed]: No. 15637. United States Court of Appeals for the Ninth Circuit. Marine Cooks & Stewards, A.F.L., a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards, Appellants, vs. Panama Steamship Company, Ltd., a corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: July 13, 1957.

Docketed: July 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15637

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS, Appellants,

vs.

PANAMA STEAMSHIP CO. LTD., a corporation, et al., Appellees.

STATEMENT OF POINTS

The appellants, Marine Cooks & Stewards, AFL, a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards, intend to rely on the following points on appeal:

1. The Norris-LaGuardia Act (29 USCA Section 101ff.) governed the District Court's jurisdiction insofar as injunctive relief was concerned.

2. Upon the record herein the injunction sought and granted was beyond the jurisdiction of the District Court because of the provisions of Section 4 of the Norris-LaGuardia Act (29 USCA Section 104).

3. Upon the record herein the Appellees were not entitled to an injunction because of failure to

satisfy the requirements of Section 7 of the Norris-LaGuardia Act (29 USCA Section 107).

VANCE & PETERSON,

Attorneys for Appellants, Marine Cooks & Stewards, AFL, a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards.

[Endorsed]: Filed July 22, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF THE RECORD MATERIAL TO THE APPEAL

Appellants herewith designate all of the record as forwarded by the Clerk of the U. S. District Court as material to the consideration of the Appeal herein.

VANCE & PETERSON,

Attorneys for Appellants, Marine Cooks & Stewards, AFL, a voluntary association, et al., James O. Willoughby, Virgil Rogers and Willard Richards.

[Endorsed]: Filed July 22, 1957. Paul P. O'Brien, Clerk.

[fol. 139]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Healy, Pope and Lemmon, Circuit Judges.

MINUTE ENTRY OF ORDER OF SUBMISSION—January 15, 1958

Ordered appeal herein argued by Mr. J. Duane Vance, counsel for the Appellants, and by Mr. Charles B. Howard, counsel for the Appellees, and submitted to the Court for consideration and decision.

[fol. 140] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,637

MARINE COOKS & STEWARDS, A.F.L., et al., Appellants,

vs.

PANAMA STEAMSHIP CO., et al., Appellees.

Before: Healy, Pope and Lemmon, Circuit Judges.

ORDER SETTING ASIDE SUBMISSION OF CASE AND SETTING FOR REARGUMENT—Filed May 21, 1958

The above entitled case was heretofore argued and submitted for decision to a panel of this Court including Judge Lemmon who died before the Judges of the panel had agreed upon a decision.

Now, therefore, it is ordered:

That the submission of the case for decision be, and hereby is set aside and the case calendared for reargument before a full panel of the Court.

William Healy, Walter L. Pope, Circuit Judges.

[fol. 141]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Pope, Healy and Orr, Circuit Judges.

MINUTE ENTRY OF ORDER OF SUBMISSION—
September 29, 1958

Ordered appeal herein reargued by Mr. J. Duane Vance, counsel for the Appellants, and by Mr. John D. Mosser, counsel for the Appellees, and submitted to the Court for consideration and decision.

[fol. 142]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Pope, Healy and Orr, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—April 6, 1959
(omitted in printing).

[fol. 143]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,637

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS, Appellants,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al., Appellees.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

OPINION—April 6, 1959

Before: Pope, Healy and Orr, Circuit Judges.

Orr, Circuit Judge:

Upon the complaint of appellees the trial court issued an order enjoining appellants from conducting certain alleged picketing activities. On the appeal lodged in this court we have had two hearings.

At the first hearing appellants rested their contentions on lack of jurisdiction of the trial court to issue the temporary injunction because of the prohibition contained in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §101 et seq. (1956).

On the second hearing their contention was broadened to include an assertion of a lack of statutory basis for the district court to consider this action at all on the civil side either as to the injunction or the claim for damages, which latter claim is still pending below.

The essential facts follow.

The S.S. Nikolos, a vessel registered under the Liberian flag and owned by appellee Panama Steamship Company [fol. 144] Ltd., a foreign corporation, arrived in Tacoma Harbor in the State of Washington during the early morning hours of June 10, 1957. Its master, officers and crew were aliens. The time-charterer, appellee Seatankers, Inc., is not a citizen of the United States.

The ship was carrying a cargo of bulk salt loaded at a port on the West Coast of Mexico. The consignee was the Hooker Electrochemical Co. to whom the cargo was to be delivered at a berth in Tacoma Harbor. The ship was cleared and passed by the Immigration, Quarantine and Custom authorities and was therefore lawfully entitled to discharge its cargo.

While at anchorage awaiting the assignment of a berth, the ship was approached by a small vessel, the "Will-O-Bee", displaying a "Picket Boat" sign and then and there operated by appellants Willoughby, Rogers, and Richards, members of appellant Marine Cooks & Stewards AFL, Willoughby being the duly authorized Port Agent. Willoughby boarded the Nikolos and notified the master that the ship was being picketed by his association.

The "Will-O-Bee" continued to circle around the Nikolos di[illegible]ying its picket signs. In addition, Willoughby threatened the Hooker Electro-Chemical Co. with the establishment of a picket line at its dock if the Nikolos was allowed to berth.

In awarding a temporary injunction pending a final determination as to damages and the issuance of a permanent injunction, the trial court made findings to the effect that the picketing conduct of appellants was an unlawful interference with international commerce and particularly with the right of appellees to carry out an international voyage and maritime contract of affreightment, utilizing a vessel lawfully registered with a friendly foreign nation and manned by an alien crew under foreign shipping articles. Further findings are that appellees have also entered into and are seeking other like contracts; that by reason of the picketing the Nikolos has acquired the reputation of a "hot ship" and that appellees' reputation for carrying out their contractual obligations have become impaired.

The trial court further found that the United States as a nation has international obligations with respect to commerce and with respect to the relations of this country with [fol. 145] friendly maritime nations and that the acts of the appellants might impair such obligations and cause irreparable damage to such relations. It found that the appellees had no adequate remedy at law and that the public officers charged with a duty to protect appellee's property were unable to furnish adequate protection as shown by lack of evidence of any action by such authorities and the fact that no public official was charged with such responsibility.

The trial court also found that there had been no fraud; no physical violence to persons or injury to tangible property or threats of such by appellants.

It seems to be an accepted fact that there was no dispute between the members of the crew or any of them and the master or owners. The picketing was purely a matter of protest by the appellants of the alleged threat to American working standards created by the foreign crews who work under substantially less favorable circumstances than crews on American ships.

In now turning to a consideration of the questioned jurisdiction of the trial court to entertain the action, we keep in mind that the jurisdiction of a federal district court rests upon statutory grant, Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850), and he who invokes that jurisdiction has the burden of establishing it. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

Appellees upon whom rests that burden specifically disclaim diversity of citizenship as creating the statutory basis. See 28 U.S.C.A. §1332.[1]

Appellee has also refrained from invoking jurisdiction on the admiralty side under 28 U.S.C.A. §1333. This position may have been dictated by the unavailability of a jury [fol. 146] trial on the damage issue in admiralty and because of appellee's belief that admiralty cannot afford injunctive relief.[2]

Appellee rests his claim of jurisdiction on 28 U.S.C.A. §1331 creating general federal question jurisdiction in the district court. Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States." (It is clear and conceded that the amount in controversy required by the statute in force at the time of the institution of suit was met.)

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[1] Apparently appellee rejects the diversity theory because some of the appellants are associations whose citizenships are determined by that of their members [see e.g. Chapman v. Barney, 129 U.S. 677 (1889) (joint stock co.); Levering & Garrigues Co. v. Morrin, 61 F.2d 115 (2d Cir. 1932) (labor union)] and some of the members are aliens as are all of appellees. Under prior forms of §1332 it has been held there is no jurisdiction under such circumstances. Ex Parte Edelstein, 30 F.2d 636 (1929).

In view of the result we reach, it is unnecessary to consider the difficult statutory and constitutional questions that would have been involved had appellee urged this as a ground for jurisdiction.

[2] It has been held that the admiralty court does not possess the distinctive remedial powers of equity. See The Eclipse, 135 U.S. 599 (1890); Gilmore & Black, The Law of Admiralty 37-39 (1957). In particular it has been held that admiralty has no power to issue an injunction. Sound Ma[illegible]ne & Mach[illegible]ne Corp. v. Westchester County, 100 F.2d 360 (1938), cert. den. 306 U.S. 642 (1939).

In sustaining jurisdiction under §1331 the first hurdle is the requirement that the substantive law creating the cause of action be federal or that some element of federal law must be established as part of the cause of action. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). That hurdle is cleared here because appellee's cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract constituting maritime torts.[3] The substantive law of such torts is basically federal. See Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Gilmore & Black, *op. cit. supra* note 2 and 2, 45 and cases cited therein. See also Romero v. International Terminal Operating Co., No. 3 U.S. October Term 1958, decided February 4, 1959 ("the federal nature of the maritime law administered in the federal courts has long been an accepted part of admiralty jurisprudence").

Having determined that the cause of action in the instant case depends upon federal law, the next problem is whether it arises under the "Constitution, laws or treaties of the United States" within the meaning of §1331.

[fol. 147] Most forceably argued pro and con has been the line of controversy typified by Doucette v. Vincent, 194 F.2d 834 (1952) in the first circuit, Paduano v. Yamashita, 221 F.2d 615 (1955) in the 2nd circuit; Jordine v. Walling, 185 F.2d 662 (1950) in the 3rd Circuit and Jenkins v. Roderick, 156 F. Supp. 299 (1957) in the Massachusetts District Court. All of those cases involved the question of whether certain seamen or longshoremen suing for personal injuries could get a jury trial by proceeding on the law side of the federal court under §1331. The theory in favor of such jurisdiction was that although the claims were cognizable in admiralty under 28 U.S.C.A. §1333[4] the sav-

[3] See e.g. The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1886) wherein the Supreme Court stated that "every species of tort, however occurring . . . if upon the high seas or navigable waters, is of admiralty cognizance"; See also Sidney Blumenthal & Co. v. U. S., 30 F.2d 247 (2d Cir. 1927) cert. den. 279 U.S. 847.

[4] "The district courts shall have original jurisdiction, exclusive of the courts of the states, of . . . any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." (emphasis added).

ings clause of that section, in bold face type in note 4, allowed them to proceed in any court competent to give an *in personam* remedy of damages and 1331 created such competence in the law side of the federal district court.

The existing difference of opinion has been resolved by the U. S. Supreme Court in the recent Romero case, supra, wherein it was held that "saving clause" actions are not within the grant of 1331. In that opinion it is stated that "from 1875 to 1950 there is not to be found a hint or suggestion to cast doubt on the conviction that the language of that statute (1331) was taken straight from Art. III, §2, cl. 1 (of the Constitution) extending the judicial power of the United States 'to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority.' Indeed what little legislative history there is indicates that this was the source. Thus the Act of 1875 (creating the predecessor of 1331) drew on the scope of this provision of clause 1, just as the Judiciary Act of 1789 (creating the admiralty jurisdiction) reflected the constitutional authorization of clause 1 of section 2 (sic.), which extended the judicial power to all cases of admiralty and maritime jurisdiction." . . . "The grant of jurisdiction over 'suits of a civil nature at common law or in equity . . .' as derived from Article II, could not reasonably be thought of as comprehending an entirely separate and distinct class [fol. 148] of cases—'Cases of admiralty and maritime jurisdiction'."

The Supreme Court thus held that Congress in utilizing the language of the Constitution in its statutory grants of jurisdiction intended to separate *admiralty and maritime* on the one hand from *law and equity* on the other. Therefore appellee's argument that jurisdiction can be found under §1331 because it is a savings clause action would be of no avail. But we are convinced that this is not a saving clause action. This is an action for an injunction, and admiralty at no time has had jurisdiction of such actions. We emphasize, this is not an action "saved" from the exclusive jurisdiction of admiralty; it is one never cognizable in admiralty. In terms of the Supreme Court distinction made in Romero, it is not a "case of admiralty and maritime

jurisdiction" but a "suit of a civil nature . . . in equity" arising because of a breach of a federal duty. It can not be said of this action as it is of "saving clause" actions, that Congress did not intend to give a double jurisdiction as there is no jurisdiction under 1333.

In order to understand the absence of a sufficiently broad equitable jurisdiction in admiralty to grant an injunction it is helpful to briefly trace the history of that court and body of law. Its early development is not entirely clear, but it apparently developed much as the law merchant during the renaissance period of world commerce. Continental scholars then busy adapting the Roman (Civil) Law were attracted by this developing customary law and admiralty still bears their imprint.

The English port towns as well as the continental ones had "maritime courts" that adjudicated according to the customary sea law. The English development was affected by the creation of the office of the Lord High Admiral who originally was a naval officer concerned mostly with suppression of piracy. It is not clear just how and when he achieved jurisdiction over civil maritime matters, but by around 1400 that jurisdiction was so broad that Parliament moved to limit it by statute to "a thing done upon the sea". 13 Richard II, c. 5 (1389) and 15 Rich. II, c. 3 (1391). [fol. 149] It still maintained a substantial jurisdiction as a court of record, however, until eventually it became involved in the great struggles for power among the various English courts. It then suffered severe narrowing of its jurisdiction because of the jealousy of the common law courts which issued writs of prohibition preventing it from entertaining actions of various kinds. For example, contract actions to

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The history here set out is mostly derived from Gilmore & Black, The Law of Admiralty (1957) and from Morrison, The Remedial Powers of Admiralty, 43 Yale Law Rev. 1 (1933).

The common law judges were also fearful of the power of admiralty that sat without a jury. It is noteworthy that at an earlier time admiralty apparently did have jury trials at least in some actions. See Mathiasen, Some Problems of Admiralty Jurisdiction in the 17th Century, 2 Amer. J. of Legal History 215 (1958).

be cognizable in admiralty not only had to concern the sea, but had to have been made at sea.

Apparently English lawyers at the time of the adoption of the American Constitution acted on the broad rule that "nothing was to be left to the Admiralty of which the common law could conveniently take cognizance . . ." —a sort of reverse savings clause. Anything for which a writ could be gotten from a common law court would not be allowed in admiralty; only what was not available elsewhere could admiralty take.[4]

Early in American judicial history the problem of the breadth of admiralty jurisdiction arose. As reference points there was the English jurisdiction already described; the English Colonial Admiralty courts had much broader jurisdiction since it was convenient for Britain to have a non-jury court of broad power in the colonies; and the broad jurisdiction of the continental admiralty courts which was similar in extent to the English prior to curtailment.

Earlier American cases frequently assumed a narrow jurisdiction, but in Waring v. Clarke, 46 U.S. (5 How.) 440 (1847) the broad continental concept was accepted. As later stated in Insurance Company v. Dunham, 78 U.S. (11 Wall.) 1, 24 (1870), "the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world . . ."

[fol. 150]

But when it came to equitable jurisdiction there was no such parallel enlightenment. The relations between the admiralty and the Chancellor in England had escaped the attention which had been paid to the famed struggle between the former and the courts of common law. Apparently in the beginning there was a concurrent jurisdiction of

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[4] Roscoe, Admiralty Practice (5th ed. 1931) at 8-9.

[5] The English admiralty jurisdiction was vastly enlarged in the nineteenth century, 3 & 4 Vict., c. 65 (1840), 13 & 14 Vict. c. 26 (1850), 24 Vict. c. 10 (1865). It is now a part of the High Court of Justice in a single division with probate and divorce.

sorts with a right asserted by the English Chancellor to take causes out of admiralty, the Chancellor being in a stronger position than even the common law courts with his injunctive powers. In *in rem* proceedings the Chancellor would not ordinarily invoke its concurrent jurisdiction unless the title came into dispute, but in "all proceedings *in personam* and in instances where any characteristically equitable relief was called for, the Chancellor always exercised the same full jurisdiction in maritime cases that he did in non-maritime cases." And the question of concurrent jurisdiction was eliminated by the *exclusion of the court of admiralty from the field*. The result was that such forms of relief as an accounting, specific performance, injunction, reformation or cancellation of contracts and relief against fraud generally, were available exclusively in Chancery." Morrison, supra at 11.

Notwithstanding the departure made by American courts from the narrow English restrictions imposed by the common law writs of prohibition, when determination of equitable rights and remedies were under consideration the English practice was followed. Thus it was held that equitable interests in a vessel must be left to ordinary land courts of equitable jurisdiction. See e.g. The Eclipse, 135 U.S. 599 (1890). Affirmative equitable relief has been consistently denied in admiralty under the prevailing view that admiralty does not possess the distinctive equity powers. See e.g. Davis v. Child, Fed. Case No. 3,628 (D. Me. 1840); The Eclipse, supra; The Robert R. Kirkland, 92 Fed. 407 (D.N.J. 1899). It has been specifically held that admiralty can not give injunctive relief. Schoenamsgruber v. Hamburg, 294 U.S. 454 (1935); Sound Machine & Marine Corp. v. Westchester County, 100 F.2d 360 (2d Cir. [fol. 151] 1938) cert. den. 306 U.S. 642 (1939); Paterson v. Dakin, 31 F. 682 (S.D. Ala. 1887)."

"There is a line of cases upholding the power of admiralty to assert equitable principles in actions otherwise within its province. "A court of admiralty is, as to all matters within its jurisdiction, a court of equity, it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction." The David Pratt, Fed. Cases No. 3,597 at 24 (D. Me. 1839). But when the question of remedies is reached the courts have resorted

Thus this action or bill for an injunction to restrain a breach of a federal duty is an action that has arisen under the "law and equity" jurisdiction of §1331;[10] the remedy

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to the distinction between law and equity and have held that admiralty lacks the power to give equitable remedies. One commentator sees: "ground for hope that a doctrinal trend is in the making that would render the ordinary equitable remedies . . . available to the admiralty court . . . " Gilmore & Black, op. cit. supra note 2 at 39, based on the case of Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) which held that admiralty could employ equitable powers when dealing with a case otherwise maritime in character. But that case cited The Eclipse, supra, as still being good law, stating: "Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property."

It should be noted that admiralty by statute has been given injunctive power in certain limited areas not here applicable.

[10] It was not until 1875 that Congress passed the predecessor of §1331 first creating, except for a brief interval (Act of Feb. 13, 1801, §11, 2 Stat. 89, 92 repealed by Act of Mar. 8, 1902, 2 Stat. 132), the general federal question jurisdiction as we know it now. The legislative history of its passage leaves much to be desired in revealing any "intent" of the Congress. "In its original form the Act applied only to controversies involving diversity of citizenship and not to substantive federal rights." Frankfurter & Landis, The Business of the Supreme Court 66 (1927). The first section was designed to change certain features of the removal jurisdiction in diversity cases originally begun in a state court, and it created much controversy and dissent. Eventually the first section was struck out and the bill left the House containing only amendments to the procedure governing removal proceedings. In the Senate a substitute bill containing the eventual form of the Act was introduced and it passed the Senate the day of its introduction with only details arousing any discussion, and it was passed in the House in its same form. It is questionable whether the Congress had any consciousness of the enormity of the change in the judicial structure thus brought about. "Although this legislation in a very real sense revolutionized the concept of the federal judiciary, it passed almost unnoticed inside or outside the halls of Congress." Hart & Wechsler, The Federal Courts & The Federal System 729 (1953). See also Frankfurter & Landis, supra at 64-68.

"These courts (federal) ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, supra at 65.

Considering the times of the enactment and the language of the statute it would seem that the purpose of such an Act would be to

[fol. 152] sought has at no time been within the "admiralty and maritime" jurisdiction of §1333.

Having jurisdiction of the action for the injunction, the district court as a court of equity may within its discretion exercise the traditional power of equity to "clean-up" the controversy by awarding damages incident to its equitable jurisdiction. Of course there would be no right to a jury trial.

The remaining question raised by appellant is that the trial court was without jurisdiction to issue the temporary injunction because of the prohibition contained in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §101 et seq. (1956). It is our conclusion that the Norris-LaGuardia Act does not apply. This view is based upon the holding of the Supreme Court in Benz v. Compania Naviera Hidalgo, S.A., 335 U.S. 138 (1957).

The question before the Supreme Court in Benz was whether the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. §141, so pre-empted the field of labor relations so as to deprive a state court of jurisdiction in a damage suit for wrongful picketing by an American union of a foreign vessel. The court held that there was no pre-emption because the Labor Management Act does [fol. 153] not apply to labor disputes arising solely out of conditions on a foreign vessel even though an American Union was the party defendant. There, as here, the argument was made by the union that the standard of work and pay on the foreign vessel was a threat to the welfare of the American union members, yet the Supreme Court held the Act inapplicable. We find no such greater interest re-

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provide a federal forum that would be sympathetic to and would become expert in the development of substantive federal law. To find that Congress had carved out an exception from so broad a statute would require some certain evidence. The Supreme Court found such evidence in Romero in the use of the Constitutional language by Congress in drawing the statutes creating separate jurisdictions for "law and equity" and for "maritime and admiralty." This case as we have indicated falls outside the latter and within the former. Thus we find no evidence that this action based on substantive federal law was meant to be excluded from the grant contained in §1331.

siding with the American union concerned in the instant case which would justify a differentiation of one from the other on that ground.

No legislative history has been brought forth to indicate that the Norris-LaGuardia Act should apply here, and as the Supreme Court said of the Taft-Hartley Act in Benz, and we think equally applicable to the Act now under consideration, "the whole background of the Act is concerned with industrial strife between American employers and employees." (353 U.S. at 143).

Appellant urges that the Taft-Hartley Act is a regulatory and substantive act whereas the Norris-LaGuardia Act is solely jurisdictional and thus it would be reasonable to deny the application of the former and still apply the latter. The answer is found in Benz where not only the application of the regulatory aspects of the Taft-Hartley Act, but also the whole complaint procedure and jurisdiction which could have provided protection for the foreign vessel against an unfair labor practice was denied.

If the Norris-LaGuardia Act was applicable here, the combination of such a holding and the holding in Benz that the Taft-Hartley Act administrative remedies are not available would result in there being no federal agency or court in which foreign commerce could seek protection. Such a result in the field of international commerce and relations should not be arrived at without more explicit direction from Congress.

Affirmed.

POPE, CIRCUIT Judge, Concurring:

The main problem here, as I see it, is whether what was said in Romero vs. International Terminal, ... U.S. ..... [fol. 154] (Feb. 24, 1959), requires a holding that Section 1331 of Title 28 does not confer jurisdiction on the court below.

I think Romero, in holding that Section 1331 does not give jurisdiction to a Federal District Court, sitting at law, over a seaman's claims against his employer for a maritime tort, did not arrive at that conclusion because the authors of the Act of 1875 which set up the provisions here relevant could not then envision that some day it would be held, as in

Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, that the right there upheld was a "federal right of recovery." It seems self evident that when the Act of 1875 spoke of suits "arising under the Constitution or laws of the United States", it was not speaking only of suits conceived of by the Act's authors in 1875 as federal rights of recovery. The Act of course looked to the future.

The basis for Romero was quite different. As I read it, it proceeds upon the thesis that the 1875 Act did not contemplate inclusion therein of the "long established, smoothly functioning" maritime jurisdiction of the federal courts which had "been left unchanged since the Act of 1789."

But what we have here is something quite different. Here the relief sought was injunction against a maritime tort. Relief of that character is wholly unknown to an admiralty court. This is not a case in respect to which "federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law." Therefore, the reason which induced the court to hold that the action in Romero was of a sort excepted from the grant of an "arising under" jurisdiction is absent here. If, as seems to be conceded, Romero establishes that jurisdiction under Section 1331 is subject to an implied exception as to cases falling within the admiralty or maritime jurisdiction, it follows that such exception should not apply here for this is not such a case, but rather a case unknown to admiralty.

[File endorsement omitted]

[fol. 155] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15637

MARINE COOKS & STEWARDS, AFL, etc., et al., Appellants,

vs.

PANAMA STEAMSHIP COMPANY, LTD., etc., et al., Appellees.

JUDGMENT—Filed and entered: April 6, 1959

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[fol. 156]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Pope, Healy and Orr, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING—June 29, 1959
(omitted in printing).

[fol. 157]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,637

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD ROGERS, Appellants,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al., Appellees.

OPINION ON PETITION FOR REHEARING—June 29, 1959

Before: Pope, Healy and Orr, Circuit Judges.

Per Curiam:

The appeal in this case was from the issuance of a preliminary injunction by the trial court. The function and purpose of a preliminary injunction is to prevent irreparable injury pending an ultimate determination of the action. In the present petition four reasons are set out as grounds for rehearing. Reason designated number 2 was not urged as a specification of error on appeal and was not presented on oral argument. Said ground number 2 is that the picketing complained of was not unlawful even if the Norris-LaGuardia Act, 29 U.S.C.A. §101 is not applicable. Inasmuch as the ground was not presented on the appeal we decline to entertain it on rehearing but leave it for consideration of the trial court in the proceedings leading to a final determination of the action for a permanent injunction. As stated by this court in Burton v. Mantanuska Valley Lines, 244 F.2d 647, 650 (9th Cir. 1957) [fol. 158] in considering the review of an interlocutory injunction:

> "necessarily the court must presuppose that in the case at bar it *may* turn out that plaintiff will ultimately lose. Thus the court *may* finally find the facts against the plaintiff who procured the temporary injunction. . . . And just as a court must of necessity obtain time in which to determine which party is right upon the facts, so in a substantial number of cases the time is necessarily required to resolve grave, difficult and complicated questions of law. If, in such a case, it is ultimately decided that the party who obtained the preliminary injunction cannot win, that in itself does not demonstrate that it was wrong to issue the injunction."

Grounds number 1 and 3 presented in support of a request for rehearing were fully considered in our opinion previously filed.

Ground number 4 presents for consideration alleged facts not before us upon the appeal, to the effect that the vessel involved was chartered by an American corporation. In its

statement of the case made by petitioner in its opening brief (page 3) reference to ownership and charter parties appear, from which no inference of American control can be logically drawn, indeed the inference is quite the opposite. For the same reason as given with respect to ground number 2 (failure to present on the appeal), we decline to consider the question on this petition and leave appellant to such action as it may choose to take if and when a permanent injunction is sought.

Petition for rehearing denied.

[File endorsement omitted]

[fol. 159] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 160]

SUPREME COURT OF THE UNITED STATES

No. 403, October Term, 1959.

MARINE COOKS & STEWARDS, AFL, etc., et al., Petitioners,

vs.

PANAMA STEAMSHIP COMPANY, LTD., et al.

ORDER ALLOWING CERTIORARI—November 16, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SEP 14 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,
Petitioners,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,
Respondents.

Petition for a Writ of Certiorari

To the United States Court of Appeals
for the Ninth Circuit

JOHN PAUL JENNINGS
Mills Tower, 220 Bush Street
San Francisco 4, California

J. DUANE VANCE
230 Sixth Avenue, North
Seattle 9, Washington

Counsel for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,
Petitioners,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,
Respondents.

Petition for a Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

To the United States Court of Appeals for the Ninth Circuit:

Petitioners Marine Cooks & Stewards, AFL, a voluntary unincorporated association, James O. Willoughby, Virgil Rogers and Willard Richards, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 6, 1959.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of April 6, 1959, printed in Appendix B hereto, infra, Appendix page 5, is reported at 265 F.2d 780. The opinion of June 29, 1959, denying rehearing printed in Appendix C hereto, infra, Appendix page 19, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959 (R. 142) Appendix page 21, infra. A timely petition for rehearing was filed on May 4, 1959, and was denied on June 29, 1959 (R. 156) Appendix page 19, infra. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1). The jurisdiction of the District Court was invoked under 28 U.S.C., Section 1331 on a claim that the matter in controversy arose under the laws of the United States.

QUESTIONS PRESENTED

The basic question is whether or not a United States District Court exercising jurisdiction under 28 U.S.C., Section 1331 may enjoin peaceful picketing of a foreign registered vessel afloat in an American port.

The following subsidiary questions are presented in determination of the ultimate question:

1. If such picketing be a maritime tort, may it be enjoined by the United States District Court or is jurisdiction of this admiralty cause of action lacking under the decision of this court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959)?

2. If such picketing constitutes a maritime tort and if *Romero* is not controlling, may a United States District Court enjoin such peaceful, non-fraudulent picketing notwithstanding the provisions of the Norris-LaGuardia Act,

29 U.S.C., Sections 101-115; and the anti-injunction provisions of the Clayton Act, 29 U.S.C., Sections 52-53?

3. Is such peaceful picketing of a foreign vessel by an American union in protest against the substandard wages, hours, and working conditions on the foreign vessel resulting in loss of employment to the picketing unions' members, a violation of the maritime law of the United States?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C., Section 1331 upon which plaintiffs below predicated jurisdiction of the District Court; the Norris-LaGuardia Act, 29 U.S.C., Sections 101, 104, 107 and 113, and the Clayton Act, 29 U.S.C., Sections 52 and 53. They are printed in Appendix A, infra, Appendix pages 1 to 4.

STATEMENT

On June 13, 1957, respondents (plaintiffs below) filed their complaint on the civil side of the United States District Court for the Western District of Washington, Southern Division, seeking damages and an injunction (R. 3-10). An order to show cause for preliminary injunction (R. 22-23) came on regularly for hearing on June 15, 1957, (R. 50 et sequitur) and on June 19, 1957, findings of fact and conclusions of law were made by the District Court (R. 30-39) and a temporary injunction granted (R. 40-43).

The petitioner, Marine Cooks & Stewards Union, hereinafter sometimes referred to as MCS, was enjoined from picketing the *SS Nikolos* or any other vessel registered under a foreign flag and manned by an alien crew and owned, operated or chartered by the plaintiffs while in the Puget Sound area (R. 40-43).

The MCS, pursuant to certification of the National Labor Relations Board, represents employees of the Stewards Department on a large majority of vessels flying the American flag on the Pacific Coast (R. 24-25). Other petitioners are officers, or members of the MCS. On June 10, 1957, the *SS Nikolos*, flying the Liberian flag, arrived at Tacoma, Washington, with a cargo of salt for a chemical company at Tacoma, Washington (R. 32-33). The cargo of salt had been loaded at Black Warrior Lagoon on the Pacific West Coast of Mexico, a few hundred miles south of the United States border (R. 32). The *SS Nikolos* is owned by the Panama Steamship Company, Ltd., a foreign corporation (R. 31) and was time chartered to Seatankers, Inc. (R. 31), a foreign corporation wholly owned by National Bulk Carriers, an American corporation (R. 90). Another wholly owned foreign subsidiary of National Bulk Carriers, Transea Carriers, had contracted with the consignee of the salt, Hooker Electro-Chemical Company of Tacoma, Washington, for the transportation of salt from Black Warrior Lagoon to the Hooker plant at Tacoma (R. 89-90). Transea Carriers in turn had a contract of affreightment with Seatankers, Inc. (R. 90). Seatankers, Inc., had chartered the *Nikolos* from the North Atlantic & Gulf Steamship Company whose corporate status is not established (R. 90) which in turn had chartered the *Nikolos* from the Panama Steamship Company, a Liberian corporation (R. 90-91). The master and the crew of the *SS Nikolos* were aliens, mostly Greek (R. 13).

The *SS Nikolos* pays less than one-fifth of the going wages under union contract (R. 26-27). As a result of the entry of the *SS Nikolos* into the trade from Mexico to Tacoma, Washington, vessels of American registry operated and manned under contract with the defendant MCS

have lost or will lose such business with resultant loss of employment to members of the MCS (R. 36-37).

Upon arrival of the *Nikolos* in Tacoma, Washington, on June 10, 1957, a small outboard vessel named the *Will-O-Bee* approached the *Nikolos* at anchor displaying a picket-boat sign. The *Will-O-Bee* was operated by petitioner James O. Willoughby, Seattle Port Agent of the MCS, who notified the master of the *Nikolos* that the MCS was picketing the ship (R. 33). The *Will-O-Bee* thereafter continued to picket by cruising around the *Nikolos* (R. 33).

There was no fraud or physical violence to persons or tangible property or threats thereof by the petitioners or any of them (R. 36).

The respondent owners or charterers, plaintiffs below, have entered into and are seeking other contracts of affreightment for carriage of like cargoes from Mexican ports to the United States ports in the Puget Sound area and to the particular consignee of this cargo (R. 35).

The District Judge was of the opinion that petitioner's conduct constituted unlawful interference with foreign commerce with a friendly foreign nation and that no labor dispute existed within the meaning of the Norris-LaGuardia Act.

The statutory basis for the jurisdiction of the District Court was not stated by the plaintiff nor the District Court.

The petitioner promptly after granting of the temporary injunction on June 19, 1957, filed notice of appeal on July 1, 1957, and the case was argued before the court of appeals on January 15, 1958 and reargued on September 15, 1958.

The court below affirmed the order of the District Court despite the intervening decision of this court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The court of appeals determined that an action on the civil side of a district court requesting an *equitable* remedy for

a maritime tort may be brought under Section 1331 although an action seeking a common law remedy on the maritime tort may not be brought on the civil side. The court of appeals further held that the prohibitions of the Norris-LaGuardia Act did not deprive the District Court of jurisdiction by reason of the holding of this court in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

Petitioners promptly sought rehearing which was denied on June 29, 1959.

REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT

1. The Decision of the Court of Appeals Is Directly Contrary to the Controlling Decision of This Court in Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

There is no disagreement as to the following:

(a) If there is a cause of action in this case it is one for maritime tort.

The majority opinion of the Court of Appeals says:

> "* * * Appellees' cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract *constituting maritime torts*." (Emphasis supplied.)

The concurring opinion in the Court of Appeals says:

> "Here the relief sought was injunction *against a maritime tort*." (Emphasis supplied.)

(b) Appellees' sole claim to jurisdiction rests upon the provisions of 28 U.S.C., Section 1331, giving the United States District Court jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Respondents disclaimed any other basis of jurisdiction of the District Court.

The Court of Appeals noted in its opinion:

> "Appellee rests his claim of jurisdiction on 28 USCA § 1331 * * *" (R. 145-6)

(c) This court held in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), that an action at law cannot be brought under Section 1331 on the civil side of a United States district court on a cause of action on a maritime tort.

The court below has concluded that an action on the civil side of the court requesting an equitable remedy rather than a common law remedy based on a maritime tort can be brought under Section 1331.

The court below reasoned that this is not a "case of admiralty and maritime jurisdiction" as that language is used in 28 U.S.C., Section 1333 or Article III of the Constitution but is instead a "case" in equity because an injunction is sought even though Federal question jurisdiction is predicated solely on a claim of maritime tort.

This court in *Romero* decided that if the suit involved a maritime claim, i.e., a maritime tort, it was a case of admiralty and maritime jurisdiction. This court specifically pointed out that this was so regardless of the remedy sought by the pleader. This language is to be found in footnote 23 to the majority opinion in the *Romero* decision.

> "All suits involving maritime claims, *regardless of the remedy sought*, are cases of admiralty and maritime jurisdiction within the meaning of Article 3 whether they are asserted in the Federal courts, or under the saving clause, in the state courts." (Emphasis supplied.)

The court below failed to consider that there is no grant of jurisdiction, equitable or otherwise, to the United States District Courts over "maritime torts" as such. The only

grant of jurisdiction over maritime torts is in Section 1333, over "any civil case of admiralty or maritime jurisdiction." To deny that this is a "case of admiralty and maritime jurisdiction" is therefore to deny that it falls within any grant of judicial authority to the Federal courts.

The majority decision of the Court below states:

> "We emphasize, this is not an action 'saved' from the exclusive jurisdiction of admiralty; it is one never cognizable in admiralty." 265 F.2d at 783.

If this be so, the plaintiffs here had no Federal claim at all, for their only claim to Federal jurisdiction is that the case *is* cognizable in admiralty. This Court made this same observation in footnote 23 to the majority opinion in *Romero*, saying:

> "Without that Constitutional grant *Romero* would have no Federal claim to assert."

In *Romero*, the plaintiffs sought a jury trial not available in admiralty and for that reason urged jurisdiction on the law side of the Federal Court where a jury trial would be available. Similarly, plaintiffs in our case seek an injunction not available in admiralty and base their claim for jurisdiction on the law side solely because only there may the remedy of injunction be given. Jurisdiction is not conferred in such a fashion.

The result reached by the court below is that if the remedy sought on a maritime tort is the equitable remedy of an injunction, the jurisdiction of the district court under Section 1331 is different and greater than a similar action on the civil side of the court seeking a common-law remedy on a maritime tort. Congress made no distinction in Section 1331 between the jurisdiction of the court sitting in equity or sitting in law. The statute presently grants juris-

diction to the court of "all civil actions wherein the matter * * * arises under the * * * laws * * * of the United States." However, in the original Act of 1875, as quoted by this Court in the *Romero* decision (358 U.S. 354, 359), the Act granted jurisdiction over "suits of a civil nature at common law or in equity." The jurisdictional grant of the statute was identical as to actions in equity and at law. The change to the words "all civil actions" was made solely because of the adoption of Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between actions at law and in equity. See reviser's notes to 28 U.S.C., Section 1331.

It must follow therefore, that the jurisdiction of the District Court on the civil side is not enlarged because an equitable remedy is sought.

A litigant asserting jurisdiction under Section 1331 must designate the "law of the United States" under which his suit arises whether the remedy sought be legal or equitable. In the *Romero* case, this court has said that claims rooted in Federal maritime law are not cases arising under the laws of the United States within the meaning of Section 1331.

The respondents' claim to jurisdiction under Section 1331 therefore must fail, and the contrary decision of the Court of Appeals cannot be reconciled with the decision of this Court in the *Romero* case.

2. This Case Involves the Important Question, Not Heretofore Decided by This Court, of the Applicability of the Norris-LaGuardia Act and the Clayton Act to Labor Disputes Involving Ships of Foreign Registry.

The court below believed the Norris-LaGuardia Act was inapplicable solely because of the decision of this Court in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

This is a question which has not been but should be determined by this Court.[1]

The petitioners' peaceful picketing grew out of a labor dispute as defined by this court's decisions in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91 (1940). A result contrary to the decision below was reached by the U.S. District Court for the Southern District of New York in *Afran Transport Co., v. National Maritime Union*, 169 Fed. Supp. 416 (1958).

Petitioners believe this court's decision in *Benz* does not foreclose applicability of the Norris-LaGuardia Act to the present dispute. Although the *Benz* case involved picketing of a foreign vessel by an American union, this is the only point of similarity. The differences, both factual and legal, between this case and the *Benz* case render the *Benz* decision inapplicable to the case at bar.

The *Benz* case as decided by this court involved an action for damages, not an injunction. In *Benz*, this court held that the Taft-Hartley Act did not apply to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel was temporarily in an American port. This court said:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

1. The Norris-LaGuardia question did not reach this court in the *Benz* case as the appeal from the temporary injunction was dismissed by the Court of Appeals since the question had become moot with the sailing of the ship. *Benz v. Compania Naviera Hidalgo*, 205 F.2d 944, cert. den. 346 U.S. 885 (1953).

The petitioners here were vitally affected by the intrusion of the *Nikolos* with its substandard wages and working conditions in a trade previously employing petitioners' members. The petitioners by their picketing were protesting the effect on their membership of the economic invasion of the foreign-registered *Nikolos*. In *Benz*, the picketing unions had no dispute with the foreign owners. Furthermore, American connection with the dispute in the present case is established in the record while in *Benz* no American interest was shown.

An American corporation could not secure an injunction under the facts shown in this record. The foreign plaintiffs (one a wholly owned subsidiary of an American corporation) seek the protection of federal maritime law but desire exemption from the procedural limitations on the availability of the injunctive remedy which apply to American litigants. The *Benz* case imports no general grant of additional remedies for foreign shipowners not available to American shipowners.

The *Benz* case decided only one issue, the applicability of the Taft-Hartley Act, where it was claimed that the federal remedy provided by that law pre-empted a claim for damages.

A determination as to applicability of the Taft-Hartley Act is not controlling in deciding applicability of the Norris-LaGuardia Act. The Taft-Hartley Act is based on the power of Congress to regulate commerce, whereas the Norris-LaGuardia Act is based on the plenary power of Congress to control District Court jurisdiction. The Taft-Hartley Act is a complete regulatory act, whereas the Norris-LaGuardia Act simply forbids granting of a particular remedy by the United States District Courts.

In *Benz*, damages were awarded for a violation of the law of Oregon, jurisdiction being based on diversity. In

the present case, the plaintiffs below relied exclusively on federal maritime law to establish their claim of wrongful picketing. The tort in *Benz* was based solely on Oregon law while the asserted wrong in the present case is predicated exclusively on the claimed violation of a law of the United States. Jurisdiction in the court below could not exist under Section 1331 unless petitioners' conduct was a violation of a law of the United States.

The court below we believe has misinterpreted the scope and meaning of this court's decision in the *Benz* case. The *Benz* decision has little or no bearing on the question of the applicability of the Norris-LaGuardia Act to controversies such as this because:

(1) The reach of the Norris-LaGuardia Act is not to be equated with that of the Taft-Hartley Act. Each springs from a different source of Congressional power and they are entirely different forms of legislation.

(2) The factual differences between *Benz* and the present case are such that the Norris-LaGuardia Act would apply here, even if not there.

(3) The *Benz* case was decided on the basis of Oregon law. The decision of the courts below that petitioners' conduct was in violation of a law of the United States ignores the applicable sections of the Clayton Act. This problem was not and could not have been involved in the *Benz* case.

The error of the court below is compounded by the court's assumption that petitioners' peaceful picketing was in violation of a "law of the United States." There is no decision of any court holding that peaceful picketing of a foreign vessel violates the maritime law of the United States and the contrary holding of the court below ignores the express

language of the Clayton Act. This court has said in *United States v. Hutcheson*, 312 U.S. 219, 236 (1940), with reference to Section 20 of the Clayton Act: "In this light section 20 removes all such allowable conduct (i.e., peaceful picketing) from the taint of being 'violations of any law of the United States', including the Sherman Law." The Clayton Act expressly applies to foreign corporations (38 Stat. 730, 29 U.S.C., Section 53). The conclusion follows that petitioners' conduct in picketing peacefully is not contrary to any law of the United States.

A determination of the legality of the petitioners' peaceful picketing of a foreign vessel under the law of the United States and the power of the District Court to enjoin such picketing raises questions of great importance in light of conditions existing today in the maritime industry.

The applicability of the Norris-LaGuardia Act and the Clayton Act to controversies such as the present involves fundamental questions which must ultimately be decided by this court in the proper exercise of its supervisory authority over the lower Federal Courts.

3. Resolution of the Issues of Law Presented by This Petition Are Fundamental to the Further Conduct of This Case.

The ultimate question presented herein is the power of the District Court to issue an injunction in this kind of labor dispute. The mischief of injunctions in labor controversies is well known. The harm is done when the interlocutory order is issued. The damage is often irreparable. The assertion by the district court of power to act in an interlocutory way is final. Whether it has that power may (and should) be determined without reference to any future proceedings which may be taken. To allow the district court to act in an interlocutory way while lacking jurisdiction would permit the district court to interfere with

a labor controversy in a way, which though interim in form, irretrievably alters the status of the dispute or, in fact, determines it. The voice of protest is stilled by injunction and the protested wrong is accomplished.

This court has frequently granted certiorari to consider fundamental and important questions decided on an interlocutory order where the questions determined are controlling in the future conduct of the case.

Bakery Sales Drivers, Local Union No. 33 v. Wagshal, 333 U.S. 437 (1948);

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685 n. 3 (1949);

Land v. Dollar, 330 U.S. 731, 734 n. 2 (1947);

U.S. v. General Motors Corp., 323 U.S. 373, 377 (1945);

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52 (1938);

American Construction Co. v. Jacksonville T. and K. W. R. Co., 148 U.S. 372 (1893).

The issues presented here are fundamental and controlling in the future conduct of this case in at least these respects:

1. If the District Court lacks jurisdiction under Section 1331, the action must be dismissed because no other claim to jurisdiction of the United States District Court is made.

2. The Court's determination as to the applicability of the Norris-LaGuardia Act will control as to the issuance of a permanent injunction as well as the temporary injunction (29 U.S.C., Sections 104, 107).

3. If the Norris-LaGuardia Act is applicable then the provisions of the Clayton Act are likewise applicable. That act immunizes the conduct here engaged in by the following language:

> "* * * Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." (29 U.S.C., Section 52)

The Clayton Act, if applicable, would require dismissal of the complaint, because the picketing may not be held to violate any law of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN PAUL JENNINGS
J. DUANE VANCE
Counsel for Petitioner

Dated: September 11, 1959.

(Appendices Follow)

Appendix A

TITLE 28 U.S. CODE, SECTION 1331

Section 1331. *Federal question—Amount in controversy.* —The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. (June 25, 1948, c. 646, § 1, 62 Stat. 930.)

NORRIS-LaGUARDIA ACT (TITLE 29, U.S. CODE)

Section 101:

"No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; * * *"

Section 104:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:"

"(c) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; * * *"

more employers or associations of employers; or (3) between one or more employers or associations of employers and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

CLAYTON ACT (TITLE 29, U.S. CODE, SECTIONS 52, 53)

Section 52. *Statutory restriction of injunctive relief.*— No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or

conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.)

Section 53. "*Person*" or "*persons*" *defined.*—The word "person" or "persons" wherever used in this act [§ 52 of this title] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (Oct. 15, 1914, c. 323, § 1, 38 Stat. 730.)

Appendix B

United States Court of Appeals for the Ninth Circuit

No. 15,637—Docketed

Marine Cooks & Stewards, AFL., a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards,
Appellants,

vs.

Panama Steamship Company, Ltd., a corporation, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

OPINION

Before: Pope, Healy and Orr, Circuit Judges.

Orr, Circuit Judge;

Upon the complaint of appellees the trial court issued an order enjoining appellants from conducting certain alleged picketing activities. On the appeal lodged in this court we have had two hearings.

At the first hearing appellants rested their contentions on lack of jurisdiction of the trial court to issue the temporary injunction because of the prohibition contained in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. § 101 et seq. (1956).

On the second hearing their contention was broadened to include an assertion of a lack of statutory basis for the district court to consider this action at all on the civil side either as to the injunction or the claim for damages, which latter claim is still pending below.

The essential facts follow.

The S.S. Nikolos, a vessel registered under the Liberian flag and owned by appellee Panama Steamship Company Ltd., a foreign corporation, arrived in Tacoma Harbor in the State of Washington during the early morning hours of June 10, 1957. Its master, officers and crew were aliens. The time-charterer, appellee Seatankers, Inc., is not a citizen of the United States.

The ship was carrying a cargo of bulk salt loaded at a port on the West Coast of Mexico. The consignee was the Hooker Electro-Chemical Co. to whom the cargo was to be delivered at a berth in Tacoma Harbor. The ship was cleared and passed by the Immigration, Quarantine and Custom authorities and was therefore lawfully entitled to discharge its cargo.

While at anchorage awaiting the assignment of a berth, the ship was approached by a small vessel, the "Will-O-Bee", displaying a "Picket Boat" sign and then and there operated by appellants Willoughby, Rogers, and Richards, members of appellant Marine Cooks & Stewards, AFL, Willoughby being the duly authorized Port Agent. Willoughby boarded the Nikolos and notified the master that the ship was being picketed by his association.

The "Will-O-Bee" continued to circle around the Nikolos displaying its picket signs. In addition, Willoughly threatened the Hooker Electro-Chemical Co. with the establishment of a picket line at its dock if the Nikolos was allowed to berth.

In awarding a temporary injunction pending a final determination as to damages and the issuance of a permanent injunction, the trial court made findings to the effect that the picketing conduct of appellants was an unlawful interference with international commerce and particularly with the right of appellees to carry out an international voyage and maritime contract of affreightment, utilizing a vessel

lawfully registered with a friendly foreign nation and manned by an alien crew under foreign shipping articles. Further findings are that appellees have also entered into and are seeking other like contracts; that by reason of the picketing the Nikolos has acquired the reputation of a "hot ship" and that appellees' reputation for carrying out their contractual obligations have become impaired.

The trial court further found that the United States as a nation has international obligations with respect to commerce and with respect to the relations of this country with friendly maritime nations and that the acts of the appellants might impair such obligations and cause irreparable damage to such relations. It found that the appellees had no adequate remedy at law and that the public officers charged with a duty to protect appellee's property were unable to furnish adequate protection as shown by lack of evidence of any action by such authorities and the fact that no public official was charged with such responsibility.

The trial court also found that there had been no fraud; no physical violence to persons or injury to tangible property or threats of such by appellants.

It seems to be an accepted fact that there was no dispute between the members of the crew or any of them and the master or owners. The picketing was purely a matter of protest by the appellants of the alleged threat to American working standards created by the foreign crews who work under substantially less favorable circumstances than crews on American ships.

In now turning to a consideration of the questioned jurisdiction of the trial court to entertain the action, we keep in mind that the jurisdiction of a federal district court rests upon statutory grant, Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850), and he who invokes that jurisdiction has the burden of establishing it: McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

Appellees upon whom rests that burden specifically disclaim diversity of citizenship as creating the statutory basis. See 28 U.S.C.A. § 1332.[1]

Appellee has also refrained from invoking jurisdiction on the admiralty side under 28 U.S.C.A. § 1333. This position may have been dictated by the unavailability of a jury trial on the damage issue in admiralty and because of appellee's belief that admiralty cannot afford injunctive relief.[2]

Appellee rests his claim of jurisdiction on 28 U.S.C.A. § 1331 creating general federal question jurisdiction in the district court. Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, *laws* or treaties of the United States." (It is clear and conceded that the amount in controversy required by the statute in force at the time of the institution of suit was met.)

In sustaining jurisdiction under § 1331 the first hurdle is the requirement that the substantive law creating the cause of action be federal or that some element of federal law must be established as part of the cause of action.

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1. Apparently appellee rejects the diversity theory because some of the appellants are associations whose citizenships are determined by that of their members [see, e.g. Chapman v. Barney, 129 U.S. 677 (1889) (joint stock co.); Levering & Garrigues Co. v. Morrin, 61 F.2d 115 (2d Cir. 1932) (labor union)] and some of the members are aliens as are all of appellees. Under prior forms of § 1332 it has been held there is no jurisdiction under such circumstances. Ex Parte Edelstein, 30 F.2d 636 (1929).

In view of the result we reach, it is unnecessary to consider the difficult statutory and constitutional questions that would have been involved had appellee urged this as a ground for jurisdiction.

2. It has been held that the admiralty court does not possess the distinctive remedial powers of equity. See The Eclipse, 135 U. S. 599 (1890); Gilmore & Black, The Law of Admiralty 37-39 (1957). In particular it has been held that admiralty has no power to issue an injunction. Sound Marine & Machine Corp. v. Westchester County, 100 F.2d 360 (1938), cert. den. 306 U.S. 642 (1939).

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). That hurdle is cleared here because appellee's cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract constituting maritime torts.[3] The substantive law of such torts is basically federal. See Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Gilmore & Black, *op. cit. supra* note 2 and 2, 45 and cases cited therein. See also Romero v. International Terminal Operating Co., No. 3 U.S. October Term 1958, decided February 4, 1959 ("the federal nature of the maritime law administered in the federal courts has long been an accepted part of admiralty jurisprudence").

Having determined that the cause of action in the instant case depends upon federal law, the next problem is whether it arises under the "Constitution, laws or treaties of the United States" within the meaning of § 1331.

Most forceably argued pro and con has been the line of controversy typified by Doucette v. Vincent, 194 F.2d 834 (1952) in the first circuit, Paduano v. Yamashita, 221 F.2d 615 (1955) in the 2nd circuit; Jordine v. Walling, 185 F.2d 662 (1950) in the 3rd Circuit and Jenkins v. Roderick, 156 F. Supp. 299 (1957) in the Massachusetts District Court. All of those cases involved the question of whether certain seamen or longshoremen suing for personal injuries could get a jury trial by proceeding on the law side of the federal court under § 1331. The theory in favor of such jurisdiction was that although the claims were cognizable

3. See e.g. The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1886) wherein the Supreme Court stated that "every species of tort, however occurring . . . if upon the high seas or navigable waters, is of admiralty cognizance"; See also Sidney Blumenthal & Co. v. U.S., 30 F.2d 247 (2d Cir. 1927) cert. den. 279 U.S. 847.

in admiralty under 28 U.S.C.A. § 1333[4] the savings clause of that section in italic type in note 4, allowed them to proceed in any court competent to give an *in personam* remedy of damages and § 1331 created such competence in the law side of the federal district court.

The existing difference of opinion has been resolved by the U. S. Supreme Court in the recent Romero case, supra, wherein it was held that "saving clause" actions are not within the grant of § 1331. In that opinion it is stated that "from 1875 to 1950 there is not to be found a hint or suggestion to cast doubt on the conviction that the language of that statute (§ 1331) was taken straight from Art. III, § 2, cl. 1 (of the Constitution) extending the judicial power of the United States 'to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority.' Indeed what little legislative history there is indicates that this was the source. Thus the Act of 1875 (creating the predecessor of § 1331) drew on the scope of this provision of clause 1, just as the Judiciary Act of 1789 (creating the admiralty jurisdiction) reflected the constitutional authorization of clause 1 of section 2 (sic.), which extended the judicial power to all cases of admiralty and maritime jurisdiction." . . . "The grant of jurisdiction over 'suits of a civil nature at common law or in equity . . .' as derived from Article III, could not reasonably be thought of as comprehending an entirely separate and distinct class of cases—'Cases of admiralty and maritime jurisdiction'."

The Supreme Court thus held that Congress in utilizing the language of the Constitution in its statutory grants

4. "The district courts shall have original jurisdiction, exclusive of the courts of the states, of . . . any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" (emphasis added).

of jurisdiction intended to separate *admiralty and maritime* on the one hand from *law and equity* on the other. Therefore appellee's argument that jurisdiction can be found under § 1331 because it is a savings clause action would be of no avail. But we are convinced that this is not a saving clause action. This is an action for an injunction, and admiralty at no time has had jurisdiction of such actions. We emphasize, this is not an action "saved" from the exclusive jurisdiction of admiralty; it is one never cognizable in admiralty. In terms of the Supreme Court distinction made in Romero, it is not a "case of admiralty and maritime jurisdiction" but a "suit of a civil nature . . . in equity" arising because of a breach of a federal duty. It can not be said of this action as it is of "saving clause" actions, that Congress did not intend to give a double jurisdiction as there is no jurisdiction under § 1333.

In order to understand the absence of a sufficiently broad equitable jurisdiction in admiralty to grant an injunction it is helpful to briefly trace the history of that court and body of law. Its early development is not entirely clear, but it apparently developed much as the law merchant during the renaissance period of world commerce.[5] Continental scholars then busy adapting the Roman (Civil) Law were attracted by this developing customary law and admiralty still bears their imprint.

The English port towns as well as the continental ones had "maritime courts" that adjudicated according to the customary sea law. The English development was affected by the creation of the office of the Lord High Admiral who originally was a naval officer concerned mostly with suppression of piracy. It is not clear just how and when

5 The history here set out is mostly derived from Gilmore & Black, The Law of Admiralty (1957) and from Morrison, The Remedial Powers of Admiralty, 43 Yale Law Rev. 1 (1933).

he achieved jurisdiction over civil maritime matters, but by around 1400 that jurisdiction was so broad that Parliament moved to limit it by statute to "a thing done upon the sea". 13 Rich. II, c. 5 (1389) and 15 Rich. II, c. 3 (1391). It still maintained a substantial jurisdiction as a court of record, however, until eventually it became involved in the great struggles for power among the various English courts. It then suffered severe narrowing of its jurisdiction because of the jealousy of the common law courts which issued writs of prohibition preventing it from entertaining actions of various kinds.[6] For example, contract actions to be cognizable in admiralty not only had to concern the sea, but had to have been made at sea.

Apparently English lawyers at the time of the adoption of the American Constitution acted on the broad rule that "nothing was to be left to the Admiralty of which the common law could conveniently take cognizance . . ."[7] a sort of reverse savings clause. Anything for which a writ could be gotten from a common law court would not be allowed in admiralty; only what was not available elsewhere could admiralty take.[8]

Early in American judicial history the problem of the breadth of admiralty jurisdiction arose. As reference points there was the English jurisdiction already described; the English Colonial Admiralty courts which had much broader jurisdiction since it was convenient for Britain to have a

6. The common law judges were also fearful of the power of admiralty that sat without a jury. It is noteworthy that at an earlier time admiralty apparently did have jury trials at least in some actions. See Mathiasen, Some Problems of Admiralty Jurisdiction in the 17th Century, 2 Amer. J. of Legal History 215 (1958).

7. Roscoe, Admiralty Practice (5th ed 1931) at 8-9.

8. The English admiralty jurisdiction was vastly enlarged in the nineteenth century; 3 & 4 Vict., c. 65 (1840), 13 & 14 Vict. c. 26 (1850), 24 Vict. c. 10 (1865). It is now a part of the High Court of Justice in a single division with probate and divorce.

non-jury court of broad power in the colonies; and the broad jurisdiction of the continental admiralty courts which was similar in extent to the English prior to curtailment.

Earlier American cases frequently assumed a narrow jurisdiction, but in Waring v. Clarke, 46 U.S. (5 How.) 440 (1847) the broad continental concept was accepted. As later stated in Insurance Company v. Dunham, 78 U.S. (11 Wall.) U. 24 (1870), "the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world . . ."

But when it came to equitable jurisdiction there was no such parallel enlightenment. The relations between the admiralty and the Chancellor in England had escaped the attention which had been paid to the famed struggle between the former and the courts of common law. Apparently in the beginning there was a concurrent jurisdiction of sorts with a right asserted by the English Chancellor to take causes out of admiralty, the Chancellor being in a stronger position than even the common law courts with his injunctive powers. In *in rem* proceedings the Chancellor would not ordinarily invoke its concurrent jurisdiction unless the title came into dispute, but in "all proceedings *in personam* and in instances where any characteristically equitable relief was called for, the Chancellor always exercised the same full jurisdiction in maritime cases that he did in non-maritime cases. And the question of concurrent jurisdiction was eliminated by the *exclusion of the court of admiralty from the field*. The result was that such forms of relief as an accounting, specific performance, injunction, reformation or cancellation of contracts and relief against fraud

generally, were available exclusively in Chancery." Morrison, supra at 11.

Notwithstanding the departure made by American courts from the narrow English restrictions imposed by the common law writs of prohibition, when determination of equitable rights and remedies were under consideration the English practice was followed. Thus it was held that equitable interests in a vessel must be left to ordinary land courts of equitable jurisdiction. See e.g. The Eclipse, 135 U.S. 599 (1890). Affirmative equitable relief has been consistently denied in admiralty under the prevailing view that admiralty does not possess the distinctive equity powers. See e.g. Davis v. Child, Fed. Case No. 3,628 (D. Me. 1840); The Eclipse, supra; The Robert R. Kirkland, 92 Fed. 407 (D.N.J. 1899). It has been specifically held that admiralty can not give injunctive relief. Schoenamsgraber v. Hamburg, 294 U.S. 454 (1935); Sound Machine & Marine Corp. v. Westchester County, 100 F.2d 360 (2d Cir. 1938) cert. den. 306 U.S. 642 (1939); Paterson v. Dakin, 31 F. 682 (S.D. Ala. 1887).[9]

9. There is a line of cases upholding the power of admiralty to assert equitable principles in actions otherwise within its province. "A court of admiralty is, as to all matters within its jurisdiction, a court of equity, it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction." The David Pratt, Fed. Cases No. 3,597 at 24 (D. Me. 1839). But when the question of *remedies* is reached the courts have resorted to the distinction between law and equity and have held that admiralty lacks the power to give equitable remedies. One commentator sees: "ground for hope that a doctrinal trend is in the making that would render the ordinary equitable remedies . . . available to the admiralty court . . ." Gilmore & Black, *op. cit. supra* note 2 at 39, based on the case of Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) which held that admiralty could employ equitable powers when dealing with a case otherwise maritime in character. But that case cited The Eclipse, supra, as still being good law, stating: "Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property."

It should be noted that admiralty by statute has been given injunctive power in certain limited areas not here applicable.

Thus this action or bill for an injunction to restrain a breach of a federal duty is an action that has arisen under the "law and equity" jurisdiction of § 1331;[10] the remedy sought has at no time been within the "admiralty and maritime" jurisdiction of § 1333.

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10. It was not until 1875 that Congress passed the predecessor of § 1331 first creating, except for a brief interval (Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92 repealed by Act of Mar. 8, 1802, 2 Stat. 132), the general federal question jurisdiction as we know it now. The legislative history of its passage leaves much to be desired in revealing any "intent" of the Congress. "In its original form the Act applied only to controversies involving diversity of citizenship and not to substantive federal rights." Frankfurther & Landis, The Business of the Supreme Court, 66 (1927). The first section was designed to change certain features of the removal jurisdiction in diversity cases originally begun in a state court, and it created much controversy and dissent. Eventually the first section was struck out and the bill left the House containing only amendments to the procedure governing removal proceedings. In the Senate a substitute bill containing the eventual form of the Act was introduced and it passed the Senate the day of its introduction with only details arousing any discussion, and it was passed in the House in its same form. It is questionable whether the Congress had any consciousness of the enormity of the change in the judicial structure thus brought about. "Although this legislation in a very real sense revolutionized the concept of the federal judiciary, it passed almost unnoticed inside or outside the halls of Congress." Hart & Wechsler, The Federal Courts & The Federal System 729 (1953). See also Frankfurter & Landis, supra at 64-68.

"These courts (federal) ceased to be restricted tribunals of fair dealing between citizens of different states, and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, supra at 65.

Considering the times of the enactment and the language of the statute it would seem that the purpose of such an Act would be to provide a federal forum that would be sympathetic to and would become expert in the development of substantive federal law. *To find that Congress had carved out an exception from so broad a statute would require some certain evidence. The Supreme Court found such evidence in Romero in the use of the Constitutional language by Congress in drawing the statutes creating separate jurisdictions for "law and equity" and for "maritime and admiralty". This case as we have indicated falls outside the latter and within the former. Thus we find no evidence that this action based on substantive federal law was meant to be excluded from the grant contained in § 1331.*

Having jurisdiction of the action for the injunction, the district court as a court of equity may within its discretion exercise the traditional power of equity to "clean-up" the controversy by awarding damages incident to its equitable jurisdiction. Of course there would be no right to a jury trial.

The remaining question raised by appellant is that the trial court was without jurisdiction to issue the temporary injunction because of the prohibition contained in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. § 101 et seq. (1956). It is our conclusion that the Norris-LaGuardia Act does not apply. This view is based upon the holding of the Supreme Court in Benz v. Compania Naviera Hidalgo, S.A., 335 U.S. 138 (1957).

The question before the Supreme Court in Benz was whether the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. § 141, so pre-empted the field of labor relations so as to deprive a state court of jurisdiction in a damage suit for wrongful picketing by an American union of a foreign vessel. The court held that there was no pre-emption because the Labor Management Act does not apply to labor disputes arising solely out of conditions on a foreign vessel even though an American Union was the party defendant. There, as here, the argument was made by the union that the standard of work and pay on the foreign vessel was a threat to the welfare of the American union members, yet the Supreme Court held the Act inapplicable. We find no such greater interest residing with the American union concerned in the instant case which would justify a differentiation of one from the other on that ground.

No legislative history has been brought forth to indicate that the Norris LaGuardia Act should apply here, and as

the Supreme Court said of the Taft-Hartley Act in Benz, and we think equally applicable to the Act now under consideration, "the whole background of the Act is concerned with industrial strife between American employers and employees." (353 U.S. at 143).

Appellant urges that the Taft-Hartley Act is a regulatory and substantive act whereas the Norris-LaGuardia Act is solely jurisdictional and thus it would be reasonable to deny the application of the former and still apply the latter. The answer is found in Benz where not only the application of the regulatory aspects of the Taft-Hartley Act, but also the whole complaint procedure and jurisdiction which could have provided protection for the foreign vessel against an unfair labor practice was denied.

If the Norris-LaGuardia Act was applicable here, the combination of such a holding and the holding in Benz that the Taft-Hartley Act administrative remedies are not available would result in there being no federal agency or court in which foreign commerce could seek protection. Such a result in the field of international commerce and relations should not be arrived at without more explicit direction from Congress.

Affirmed.

POPE, Circuit Judge, Concurring:

The main problem here, as I see it, is whether what was said in Romero vs. International Terminal, ... U.S. ..... (Feb. 24, 1959), requires a holding that Section 1331 of Title 28 does not confer jurisdiction on the court below.

I think Romero, in holding that Section 1331 does not give jurisdiction to a Federal District Court, sitting at law, over a seaman's claims against his employer for a maritime tort, did not arrive at that conclusion because the authors of the Act of 1875 which set up the provisions

here relevant could not then envision that some day it would be held, as in Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, that the right there upheld was a "federal right of recovery." It seems self evident that when the Act of 1875 spoke of suits "arising under the Constitution or laws of the United States", it was not speaking only of suits conceived of by the Act's authors in 1875 as federal rights of recovery. The Act of course looked to the future.

The basis for Romero was quite different. As I read it, it proceeds upon the thesis that the 1875 Act did not contemplate inclusion therein of the "long established, smoothly functioning" maritime jurisdiction of the federal courts which had "been left unchanged since the Act of 1789."

But what we have here is something quite different. Here the relief sought was injunction against a maritime tort. Relief of that character is wholly unknown to an admiralty court. This is not a case in respect to which "federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law." Therefore, the reason which induced the court to hold that the action in Romero was of a sort excepted from the grant of an "arising under" jurisdiction is absent here. If, as seems to be conceded, Romero establishes that jurisdiction under Section 1331 is subject to an implied exception as to cases falling within the admiralty or maritime jurisdiction, it follows that such exception should not apply here for this is not such a case, but rather a case unknown to admiralty.

(Endorsed:) Opinion and Concurring Opinion. Filed Apr. 6, 1959.

PAUL P. O'BRIEN, *Clerk.*

Appendix C

United States Court of Appeals for the Ninth Circuit

No. 15,637 June 29, 1959

Marine Cooks & Stewards, AFL, a voluntary association, James O. Willoughby, Virgil Rogers and Willard Richards,
Appellants,

vs.

Panama Steamship Company, Ltd., a corporation, et al.,
Appellees.

On Petition for Rehearing.

OPINION

Before: Pope, Healy and Orr, Circuit Judges.

Per Curiam:

The appeal in this case was from the issuance of a preliminary injunction by the trial court. The function and purpose of a preliminary injunction is to prevent irreparable injury pending an ultimate determination of the action. In the present petition four reasons are set out as grounds for rehearing. Reason designated number 2 was not urged as a specification of error on appeal and was not presented on oral argument. Said ground number 2 is that the picketing complained of was not unlawful even if the Norris-LaGuardia Act, 29 U.S.C.A. § 101 is not applicable. Inasmuch as the ground was not presented on the appeal we decline to entertain it on rehearing but leave it for consideration of the trial court in the proceedings lead-

ing to a final determination of the action for a permanent injunction. As stated by this court in Burton v. Mantanuska Valley Lines, 244 F.2d 647, 650 (9th Cir. 1957), in considering the review of an interlocutory injunction:

> "necessarily the court must presuppose that in the case at bar it *may* turn out that plaintiff will ultimately lose. Thus, the court *may* finally find the facts against the plaintiff who procured the temporary injunction . . . And just as a court must of necessity obtain time in which to determine which party is right upon the facts, so in a substantial number of cases the time is necessarily required to resolve grave, difficult and complicated questions of law. If, in such a case, it is ultimately decided that the party who obtained the preliminary injunction cannot win, that in itself does not demonstrate that it was wrong to issue the injunction."

Grounds number 1 and 3 presented in support of a request for rehearing were fully considered in our opinion previously filed.

Ground number 4 presents for consideration alleged facts not before us upon the appeal, to the effect that the vessel involved was chartered by an American corporation. In its statement of the case made by petitioner in its opening brief (page 3) reference to ownership and charter parties appear, from which no inference of American control can be logically drawn, indeed the inference is quite the opposite. For the same reason as given with respect to ground number 2 (failure to present on the appeal), we decline to consider the question on this petition and leave appellant to such action as it may choose to take if and when a permanent injunction is sought.

Petition for rehearing denied.

(Endorsed.) Per Curiam Opinion on Petition for Rehearing. Filed June 29, 1959.

PAUL P. O'BRIEN, *Clerk*

Appendix D

United States Court of Appeals for the Ninth Circuit

No. 15,637

Marine Cooks & Stewards, etc., et al.,
Appellants,
vs.
Panama Steamship Company, Ltd., a corporation, et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and hereby is affirmed.

(Endorsed Judgment Filed and Entered: April 6, 1959
PAUL P. O'BRIEN, *Clerk*)

Office-Supreme Court, U.S.
FILED
OCT 12 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLIAM RICHARDS,

Petitioners.

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JOHN D. MOSSER,
WOOD, MATTHIESSEN, WOOD & TATUM,
1310 Yeon Building,
Portland, Oregon,

CHARLES B. HOWARD,
SUMMERS, BUCEY & HOWARD,
840 Central Building,
Seattle 4, Washington,
Counsel for Respondents.

STEVENS NESS LAW PUB. CO., PORTLAND, ORE. 10-59

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In the Supreme Court
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OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLIAM RICHARDS,

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PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of District Judge Boldt appears in the Record at pages 118-128. It is reported at 1959 A.M.C. 340.

The opinion of the Court of Appeals for the Ninth Circuit, by Circuit Judge Orr, is reported at 265

F. 2d 780, with the concurring opinion of Circuit Judge Pope following at 265 F. 2d 787. Both form Appendix B to the petition. The *per curiam* opinion of the Court of Appeals denying rehearing is not yet reported, but appears as Appendix C to the petition.

STATEMENT OF THE CASE

The SS NIKOLOS was a merchant vessel registered under the Liberian Flag. It arrived at the Port of Tacoma, Washington on June 10, 1957, to discharge a full cargo of bulk salt which it had loaded in Mexico. (Findings V and VII, R. 32, 33)

It was intercepted in the harbor by the WILL-O-BEE, a small cabin cruiser owned and operated by some of petitioners. This began to circle about the NIKOLOS displaying signs "PICKET BOAT" (Findings IX and X, R. 33). Later an additional sign was displayed reading, "AFL-CIO seamen protest loss of their livelihood to foreign flag ships with sub-standard wages or sub-standard conditions" (R. 60).

Petitioners also threatened the consignee of the cargo with establishment of a picket line at its dock if it allowed the NIKOLOS to berth there (Finding XI, R. 33).

Petitioners' activities had their intended effect: the consignee of the salt refused the ship a berth at its dock, tugs declined to assist the vessel to a berth, and the NIKOLOS was forced to remain at anchor in the harbor (Findings XII, XIV and XV, R. 34).

Respondents Panama Steamship Company, Ltd., Seatankers, Inc. and Socrates Paleocrassas, respectively the owner, time charterer and master of the NIKOLOS (Findings I, II and III, R. 31), then filed a complaint (R. 3-10) in the United States District Court for the Western District of Washington, Southern Division, seeking damages and temporary and permanent injunctive relief against petitioners. An order to show cause why a temporary injunction should not be granted issued (R. 22-23) and extensive hearings were held, at which petitioners' sole contention was that the existence of a "labor dispute" within the meaning of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq, deprived the Court of jurisdiction to issue an injunction.

The evidence was that no dispute of any kind existed between respondents and the members of the NIKOLOS' crew (R. 14). Petitioners did not even claim that there was and expressly disclaimed any contact or affiliation with the crew members (R. 28).

Rather, petitioners' contention was based on the undisputed facts that their activities were without fraud or violence (Finding XXIII, R. 36) and that, as a result of the shipment of salt from Mexico aboard the NIKOLOS and proposed shipments aboard other foreign flag vessels, American flag vessels manned under contracts with American unions had lost or would lose such business with resultant loss of employment opportunities to members of these American unions, including petitioner Marine Cooks and Stewards (Finding XXIV, R. 36-37).

The Court found, however, that the owner and

charterer of the vessel were both foreign corporations (Findings I and II, R. 31), the master, officers and crew of the NIKOLOS all aliens serving under articles subject to the laws of Liberia (Finding VI, R. 32) and that petitioners' activities constituted "acts of unlawful interference with international commerce and particularly the right of plaintiffs to carry out an international voyage and maritime contract of affreightment with a vessel lawfully registered by a friendly foreign nation manned by an alien crew under foreign shipping articles" (Finding XIII, R. 34). It concluded that "the term 'labor dispute' as used in the Norris LaGuardia Act does not contemplate a dispute foreign in nature" (Conclusion II, R. 37).

Finding substantial and irreparable damage to respondents (Findings XV, XVII, R. 34, 35), as well as irreparable damage to the obligations and relations of the United States with friendly maritime nations (Finding XVIII, R. 35) and that no remedy existed at law (Finding XXI, R. 36), the District Court issued an interlocutory injunction (R. 40-43). At the request of petitioners' counsel (R. 134), this enjoined picketing or otherwise interfering with discharge of cargoes not only from the NIKOLOS but also from other foreign flag vessels, manned by aliens under foreign articles and owned, operated or chartered by respondents.

Appealing from this, petitioners again placed sole reliance on the Norris-LaGuardia Act (R. 137). The Court of Appeals for the Ninth Circuit found, as this Court had of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141 et seq in *Benz*

v. Compania Naviera Hidalgo S.A. (1957), 335 U.S. 138, that, "the whole background of the Act is concerned with industrial strife between American employers and employees," and held the Act inapplicable to labor conditions aboard the foreign vessel and between the foreign employer and foreign employees involved here.

The Court of Appeals also dealt with a contention that the District Court lacked jurisdiction of the complaint, which petitioners had raised by supplemental briefs and in oral argument. It found jurisdiction under 28 U.S.C. § 1331, holding that the case arose under the Constitution and laws of the United States because of the federal nature of respondents' maritime rights and petitioners' maritime actions. It distinguished *Romero v. International Terminal Operating Co.* (1959), 358 U.S. 354, since Admiralty jurisdiction, there held to be the exclusive federal jurisdiction of a remedy by damages, is entirely lacking of the injunctive remedy here sought.

By petition for rehearing, petitioners for the first time challenged the District Court's finding that respondent Seatankers, Inc. was a foreign corporation and also for the first time contended that the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52, prevented their conduct from being unlawful. By *per curiam* opinion the Court of Appeals held these questions not properly before it, but left them for consideration of the District Court in proceedings for damages or permanent injunctive relief.

Petitioners seek to present all these questions to the Supreme Court, whether considered below or not.

ARGUMENT

I. Certiorari Should be Denied in View of the Interlocutory Nature of the Judgment Below.

This Court has long adhered to a policy against certiorari to review interlocutory orders—even when the questions are deemed important enough to warrant certiorari after final judgment and are jurisdictional in nature. *Indianapolis v. Chase National Bank* (1941), 314 U.S. 63, 86 L. ed. 47; 62 S. Ct. 15, makes this clear. The District Court there dismissed the complaint for want of jurisdiction. The Circuit Court of Appeals found diversity jurisdiction and reversed for trial. Certiorari was denied at that point. But, after a final judgment was entered for the plaintiff, certiorari was granted "because of the important jurisdictional issue involved in the litigation," 314 U.S. at p. 72, and the judgment reversed.

There is a particularly good reason for following that policy in this case. Petitioners now seek to make both a contention of fact and an argument of law not properly presented or considered below. They should, therefore, not be considered by this Court now, but left for review after final development of them in the District Court as directed by the Court of Appeals.

II. The Answer to the First Question Petitioners Seek to Present Was Correctly Given Below and Is of Little Importance.

Petitioners urge that there is a conflict between the decision below and *Romero v. International Terminal*

Operating Co. (1959), 358 U.S. 354, 3 L. ed. 2d 368, 79 S. Ct. 468. This Court was unanimous in *Romero* in agreeing that a seaman's claim for damages due to unseaworthiness was governed by substantive federal maritime law. A minority of the Court felt that the case, therefore, arose "under the Constitution or laws of the United States" within the meaning of the Judiciary Act of 1875, now 28 U.S.C. § 1331, granting the District Courts jurisdiction of all suits of a civil nature at common law or in equity so arising. The opinion of the Court held, however, that such coverage was not intended for two reasons:

> "The provision of the Act of 1875 with which we are concerned was designed to give a new content of jurisdiction to the federal courts, not to reaffirm one long-established, smoothly functioning since 1789. We have uncovered no basis for finding the additional design of changing the method by which federal courts had administered admiralty law from the beginning. The federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law." (3 L. ed. at 380)

> "The historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal, would be taken away by an expanded view of Sec. 1331, since saving-clause actions would then be freely removable under Sec. 1441 of Title 28. The interpretation of the Act of 1875 contended for would have consequences more deeply felt than the elimination of a suitor's traditional choice of forum. By making maritime cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters—a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve." (3 L. ed. 2d 382)

The decision of the Court of Appeals in this case followed *Romero* in holding that the tortious conduct of petitioners on navigable waters and infringing respondents' maritime rights was governed by substantive federal law. However, the Court of Appeals found the reasoning of this Court in *Romero* inapplicable to exclude this case from the jurisdiction granted by 28 U.S.C. § 1331, because of the uniform line of decisions denying jurisdiction in Admiralty to grant affirmative equitable relief, and particularly injunctive relief. See 265 F. 2d at 783-786, Appendix to Petition at 10-15.

Thus, the Judiciary Act of 1875 in granting jurisdiction of equity cases such as this to the lower federal courts was not duplicating a "long established and smoothly functioning" jurisdiction in which "federal admiralty courts had been completely adequate." Rather, it was for the first time providing a federal forum "for vindicating every right given by the Constitution, the laws and treaties of the United States." Frankfurter & Landis, The Business of the Supreme Court 65 (1927).

Likewise, there is here no conflict with the "saving clause" reservation to suitors of a right to pursue a common law remedy in state courts. Recognizing that cases for equitable relief were not within Admiralty jurisdiction, much less exclusively within it, the saving clause makes no reference to them. The Judiciary Act of 1875 does, and it inclusion of cases such as this cannot be interpreted away by the reasoning of *Romero*.

While highly interesting to a legal scholar, the distinction between this case and *Romero* is of too limited

importance to justify certiorari. In maritime matters where equitable relief may be important diversity jurisdiction is generally present. Indeed, it would be present in this case but for the fact that Marine Cooks and Stewards, an unincorporated association having no citizenship, was sued as an entity. Diversity jurisdiction could easily have been obtained by a class suit against its members, naming as representatives only union members diverse from the plaintiffs. *Supreme Tribe of Ben Hur v. Cauble* (1921), 255 U.S. 356, 65 L. ed. 673, 41 S. Ct. 338; 2 Barron & Holtzoff, Federal Procedure, Sec. 569, p. 176. And a judgment in such a class suit would be equally binding on the association and its assets as one entered in this suit. *Tunstall v. Brotherhood of Locomotive Firemen* (CCA 8, 1948), 148 F. 2d 403.

III. The Decision of the Court Below that the Norris-LaGuardia Act Is Inapplicable to this Case Is Completely in Accord with the Decisions of this Court.

The court below held that the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq., was intended to apply only in disputes between American employers and American employees and did not comprehend the foreign employment situation here. This decision is in line with this Court's recent decisions finding domestic limitations to other acts of Congress: *Benz v. Compania Naviera Hidalgo S.A.* (1957), 353 U.S. 138, 1 L. ed. 709, 77 S. Ct. 699 (holding the Taft-Hartley Act inapplicable in a virtually identical situation); *Foley Bros. Inc.*

v. Filardo (1949), 336 U.S. 281, 93 L. ed. 680, 69 S. Ct. 571 (Federal Eight Hour Law not intended to govern work performed for an American contractor on U. S. bases in Iraq and Iran); *Romero v. International Terminal Operating Co.*, supra; and *Lauritzen v. Larsen* (1953), 345 U.S. 571, 97 L. ed. 1254, 73 S. Ct. 921, (the universal "any seaman" of the Jones Act construed not to cover foreign seamen employed on foreign flag vessels by foreign employers and respectively injured in American waters and foreign waters).

Petitioners seek to distinguish the *Benz* case. First, they argue, the facts are different. It is hard to see how they are significantly so. There, as here, there was a Liberian vessel temporarily present in an American port on one leg of an international voyage. There, as here, the vessel was owned by a foreign corporation and manned by an alien crew serving under articles opened abroad and to which foreign law was applicable. There, as here, the vessel was picketed by American unions proclaiming their own self interest. It is true that in *Benz* the members of the crew were also disputing with the shipowner over terms, tenure and conditions of employment and had asked the American unions to assist them. No such dispute is present here. How the evidence of that additional dispute would make American labor legislation inapplicable there but not here petitioners do not explain.

Petitioners seek to create a factual difference between *Benz* and this case by arguing that here the foreign corporate charterer of the vessel should be considered

American because of American ownership of its stock. No such claim was made at the District Court's hearings and petitioners did not object to the finding of the trial court that the charterer of the vessel was a foreign corporation (Finding II, R. 31). The Court of Appeals refused to consider this contention on rehearing because of failure to present it on the appeal; but noted in its opinion denying rehearing that,

> "In it statement of the case made by petitioner in its opening brief (page 3) reference to ownership and charter parties appear, from which no inference of American control can be logically drawn, indeed the inference is quite the opposite." (Appendix to the Petition at 20)

Even if the charterer were American, however, it should make no difference. Petitioners do not question that Panama Steamship Company, the owner of the vessel, was a Panamanian corporation (R. 73), owned by Greeks and with its principal office and place of business in London, England (R. 72-73). Nor is it questioned that the master and crew were hired and paid by the owner (R. 70-71). There is no evidence of any American connection with the vessel's owner except a series of charter arrangements culminating in the sub time charter for this particular voyage by a foreign subsidiary of an American concern. The time charter is not shown to have anything to do with employment relations aboard the vessel or to give the time charterer any control over them.

Petitioners next seek to distinguish *Benz* because of supposed differences between the Norris-LaGuardia

Act and the Taft-Hartley Act. They carefully avoid comparison of the language of the two Acts for obvious reasons. The definition of labor dispute in the Taft-Hartley Act is found in 29 U.S.C. § 152(9):

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

The definition of labor dispute in the Norris-LaGuardia Act is identical except for omission of the word "tenure", 29 U.S.C. § 113(c).

Similarly, both Acts contain recitals as to the inability of the individual workman to adequately protect his interest in relations with employers and declare a purpose to promote collective bargaining. Compare 29 U.S.C. § 102 with 29 U.S.C. § 151. So far as applicability to foreign commerce is concerned, the Taft-Hartley Act is specifically made applicable to commerce "between any foreign country and any state", 29 U.S.C. § 152(6), while the Norris-LaGuardia Act is entirely silent.

Thus nothing by definition of labor dispute, declaration of purpose or express reference to foreign commerce would indicate that Norris-LaGuardia should apply where Taft-Hartley was held not to apply in *Benz*.

Petitioners urge, however, that Norris-LaGuardia

springs from the plenary power of Congress to define jurisdiction of the lower federal courts and is procedural in nature, while Taft-Hartley springs from the commerce power and is intended to affect substantive relations. Contradicting themselves, petitioners cite *U. S. v. Hutcheson* (1940), 312 U.S. 219, 85 L. ed. 788, 61 St. Ct. 463, in which this Court found an implied amendment by the Norris-LaGuardia Act of the Clayton Act. Clearly a purely procedural act could not amend a substantive law applying to commerce and insofar as such an amendment was effected the Norris-LaGuardia Act must also spring from the commerce power. On the other hand, it is apparent that the Taft-Hartley Act is not concerned only with substantive rights, but is largely designed to effectuate procedures for promoting collective bargaining and had the effect of removing from the jurisdiction of both federal and state courts many cases vested exclusively with the Board.

Nothing seems clearer than the closely woven interrelationship of these two Acts designed to affect American labor relations. To hold one applicable and the other not would indeed have strange results, as the Court of Appeals noted in deciding this case,

> "If the Norris-LaGuardia Act was applicable here, the combination of such a holding and the holding in Benz that the Taft-Hartley Act administrative remedies are not available would result in there being no federal agency or court in which foreign commerce could seek protection. Such a result in the field of international commerce and relations should not be arrived at without more explicit direction from Congress." (265 F. 2d at 787. Petition Appendix at 17.)

Finally petitioners seek distinction in the fact that in *Benz* the substantive law of Oregon was applied while here substantive federal maritime law applies. The essence of their contention is that Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52, prevents their conduct from being a violation of any federal law, while the same argument would not apply with respect to violations of state law. As already noted, this contention was not timely made and therefore not considered below. The circular nature of the argument should, however, be pointed out.

Section 20 of the Clayton Act, 29 U.S.C. § 52, describes certain labor activities and concludes, "Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." That language was, however, promptly held to be applicable to the described activities, including picketing, only where they are engaged in by employees in a dispute with their own employer. *Duplex Printing Press Co. v. Deering* (1921), 254 U.S. 443, 65 L. ed. 349, 41 S. Ct. 172, 16 A.L.R. 196. There is no contention that there was any such dispute here. While the limits placed on the Clayton Act were broadened by the implied amendment made by enactment of the Norris-LaGuardia Act, as held in *U. S. v. Hutcheson*, supra, they could not have been thus enlarged beyond the scope of the Norris-LaGuardia Act.

Petitioners have the cart before the horse. They argue that the Norris-LaGuardia Act may apply because the Clayton Act applies, when in fact the appli-

cability of the Clayton Act first depends upon a finding that Norris-LaGuardia applies

As the court below held, it does not. There is no need for certiorari to affirm that holding in view of the guidance recently given in *Benz*, and which it follows.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

If, however, certiorari is granted by the Court, review should be limited to either or both of the questions properly presented and decided below:

1. Did the District Court have jurisdiction of the complaint?
2. Did the Norris-LaGuardia Act deprive the District Court, on the facts found by it, of jurisdiction to grant injunctive relief?

Respectfully submitted,

JOHN D. MOSSER,
CHARLES B. HOWARD,
Counsel for Respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,
Petitioners,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Petitioners

JOHN PAUL JENNINGS
Mills Tower, 220 Bush Street
San Francisco 4, California

J. DUANE VANCE
230 Sixth Avenue, North
Seattle 9, Washington

Counsel for Petitioners

PARKER PRINTING COMPANY, 199 FIRST STREET, SAN FRANCISCO 5

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Petitioners

OPINIONS BELOW

The opinion of the Court of Appeals of April 6, 1959, (R. 140 to 152) is reported at 265 F.2d 780. The opinion of June 29, 1959, denying rehearing (R. 153 to 155) is reported at 268 F.2d 935.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959 (R. 153). A timely petition for rehearing was filed on May 4, 1959, and was denied on June 29, 1959 (R. 153-155). Petition for a writ of certiorari was filed on September 14, 1959 and granted on November 16, 1959. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C., Section 1331 on a claim that the matter in controversy arose under the laws of the United States.

QUESTIONS PRESENTED

Jobs of American seamen were lost and future employment jeopardized when a vessel of foreign registry chartered by American-owned interests but employing foreign seamen at a fraction of American pay entered into trade previously held by ships of American registry under contract with American unions. Upon arrival at the port of discharge the vessel was peacefully and non-fraudulently picketed while at anchor by a union representing employees whose jobs were lost and whose future jobs were thus jeopardized. Under such circumstances may a United States District Court exercising jurisdiction under 28 U.S.C., Section 1331 enjoin peaceful picketing of the foreign-registered vessel.

The following subsidiary questions are presented in determination of the ultimate question:

1. If such picketing be a maritime tort, may it be enjoined by the United States District Court or is jurisdiction of this admiralty cause of action lacking under the decision of this court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959)?

2. May a United States District Court enjoin such peaceful, non-fraudulent picketing notwithstanding the provisions of the Norris-LaGuardia Act, 29 U.S.C., Sections 101-115; and the anti-injunction provisions of the Clayton Act, 29 U.S.C. Sections 52-53?

3. Is such peaceful picketing of a foreign vessel by an American union protesting the loss of employment to its members, resulting from the replacement of an American vessel by the foreign vessel, with its substandard wages, hours, and working conditions, a violation of the maritime law of the United States?

STATUTES INVOLVED

The Constitutional and statutory provisions involved are Article III, Section 2, Clause 1 of the United States Constitution; 28 U.S.C., Section 1331 upon which plaintiffs below predicated jurisdiction of the District Court; the Norris-LaGuardia Act, 29 U.S.C., Sections 101, 102, 104, 107 and 113; and the Clayton Act, 29 U.S.C., Sections 52 and 53. They are printed in Appendix A, infra, Appendix pages 1 to 6.

STATEMENT

On June 13, 1957, respondents (plaintiffs below) filed their complaint on the civil side of the United States District Court for the Western District of Washington, Southern Division, seeking damages and an injunction (R. 3-10). An order to show cause for preliminary injunction (R. 22-23) came on regularly for hearing on June 15, 1957, (R. 50 et seq.) and on June 19, 1957, findings of fact and conclusions of law were made by the District Court (R. 30-39) and a temporary injunction granted (R. 40-43).

The petitioner, Marine Cooks & Stewards Union, hereinafter sometimes referred to as MCS, was enjoined from picketing the *SS Nikolos* or any other vessel registered under a foreign flag and manned by an alien crew and owned, operated or chartered by the plaintiffs while in the Puget Sound area (R. 40-43).

The MCS, pursuant to certification of the National Labor Relations Board, represents employees of the Stewards Department on a large majority of vessels flying the American flag on the Pacific Coast (R. 24-25). Other petitioners are officers, or members of the MCS. On June 10, 1957, the *SS Nikolos*, flying the Liberian flag, arrived at Tacoma, Washington, with a cargo of salt for a chemical company at Tacoma, Washington (R. 32-33). The cargo of salt had been loaded at Black Warrior Lagoon on the Pacific West Coast of Mexico, a few hundred miles south of the United States border (R. 32). The *SS Nikolos* is owned by the Panama Steamship Company, Ltd., a foreign corporation (R. 31) and was time chartered to Seatankers, Inc. (R. 31), a foreign corporation wholly owned by National Bulk Carriers, an American corporation (R. 90). Another wholly owned foreign subsidiary of National Bulk Carriers, Transea Carriers, had contracted with the consignee of the salt, Hooker Electro-Chemical Company of Tacoma, Washington, for the transportation of salt from Black Warrior Lagoon to the Hooker plant at Tacoma (R. 89-90). Transea Carriers in turn had a contract of affreightment with Seatankers, Inc., (R. 90). Seatankers, Inc., had chartered the *Nikolos* from the North Atlantic & Gulf Steamship Company whose corporate status is not established (R. 90) which in turn had chartered the *Nikolos* from the Panama Steamship Company, a Liberian corporation (R. 90-91).

The master and the crew of the *SS Nikolos* were aliens, mostly Greek (R. 13). (See chart, Appendix B, Appendix p. 7, showing the relations between these various companies.)

The *SS Nikolos* pays less than one-fifth of the going wages under union contract (R. 26-27). As a result of the entry of the *SS Nikolos* into the trade from Mexico to Tacoma, Washington, vessels of American registry operated and manned under contract with the defendant MCS have lost or will lose such business with resultant loss of employment to members of the MCS (R. 36-37).

Upon arrival of the *Nikolos* in Tacoma, Washington, on June 10, 1957, a small outboard vessel named the *Will-O-Bee*, displaying a "Picket Boat" sign, approached the *Nikolos* at anchor (R. 59). Later an additional sign was displayed reading "AFL-CIO seamen protest loss of their livelihood to foreign-flag ships with sub-standard wages or sub-standard conditions" (R. 60). The *Will-O-Bee* was operated by petitioner James O. Willoughby, Seattle Port Agent of the MCS, who notified the master of the *Nikolos* that the MCS was picketing the ship (R. 33). The *Will-O-Bee* thereafter continued to picket by cruising around the *Nikolos* (R. 33).

There was no fraud or physical violence to persons or tangible property or threats thereof by the petitioners or any of them (R. 36). Petitioners did not claim to be acting in behalf of the crew of the *Nikolos* and no dispute existed between the foreign crew and their foreign employers (R. 14, 28).

As respondents pointed out in their brief in opposition (p. 2), petitioners also theatened the consignee of the cargo with establishment of a picket line at its dock if it allowed the *Nikolos* to berth there (Finding XI, R. 33). The consignee of the salt refused the ship a berth at its dock, tugs declined to assist the vessel to a berth, and the *Nikolos* was

forced to remain at anchor in the harbor (Findings XII, XIV and XV, R. 34).

The respondent owners or charterers, plaintiffs below, have entered into and are seeking other contracts of affreightment for carriage of like cargoes from Mexican ports to the United States ports in the Puget Sound area and to the particular consignee of this cargo (R. 35).

The District Judge was of the opinion that petitioners' conduct constituted unlawful interference with foreign commerce with a friendly foreign nation and that no labor dispute existed within the meaning of the Norris-LaGuardia Act (Finding XIII, R. 34, Conclusion II, R. 37, R. 122-3, 129).

The statutory basis for the jurisdiction of the District Court was not stated by the plaintiff nor the District Court.

The petitioner promptly after granting of the temporary injunction on June 19, [illegible], filed notice of appeal on July 1, 1957, and the case was argued before the Court of Appeals on January 15, 1958 and reargued on September 15, 1958.

The court below affirmed the order of the District Court despite the intervening decision of this court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The Court of Appeals determined that an action on the civil side of a district court requesting an *equitable* remedy for a maritime tort may be brought under Section 1331 although an action seeking a common-law remedy on the maritime tort may not be brought on the civil side. The Court of Appeals further held that the prohibitions of the Norris-LaGuardia Act did not deprive the District Court of jurisdiction by reason of the holding of this court in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

Petitioners promptly sought rehearing which was denied on June 29, 1959.

SUMMARY OF ARGUMENT

The District Court believed the Norris-LaGuardia Act inapplicable because a foreign registered ship was picketed and the plaintiffs were foreign corporations. The District Court believed the conduct of the defendant union was unlawful interference with foreign commerce—"unlawful under the international obligations of the nations" (R. 129).

The basis for federal jurisdiction was not clarified until appeal where the Court of Appeals agreed with the contention of plaintiffs that federal question jurisdiction under Section 1331 was established because the conduct of defendants constituted a maritime tort. The Court of Appeals agreed also with the District Court that the Norris-LaGuardia Act was not applicable, believing the decision of this court in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. (1957), 138, was controlling.

There is no claim that the Norris-LaGuardia Act makes any express exception for foreign corporations, nor do plaintiffs argue that foreign corporate businesses are immune from the procedural requirements of the Norris-LaGuardia Act.

The argument of the courts below and of plaintiffs is that a labor dispute within the meaning of the Norris-LaGuardia Act does not exist here because the dispute involved a foreign ship owned and operated by foreign corporations.

The union's picketing protested the economic invasion by the *Nikolos* into what had been an American trade, replacing an American vessel and putting some of the union's members out of work.

On a literal reading of the statute, this case involves and grows out of a labor dispute as defined in the Norris-LaGuardia Act. This court has held the Norris-LaGuardia

Act applicable to similar cases and has rejected a narrow and restricted interpretation of "labor dispute."[1]

This court has held the Norris-LaGuardia Act not applicable where the mandate of a later statute qualified the broad restrictions of the Norris-LaGuardia Act.[2]

This court likewise has held that in interpreting the Norris-LaGuardia Act and in determining the existence of a labor dispute within the meaning of that act, the Norris-LaGuardia Act and the Clayton Act are to be read together.[3]

The petitioners urge that the Norris-LaGuardia Act should be interpreted in the light of other federal statutes passed for protection of the American Merchant Marine. These laws evince a Congressional policy not to grant special privileges to foreign owned merchant vessels seeking to compete with American Merchant vessels.[4]

The *Benz* case is not controlling. The holding of that case is only that a foreign shipowner may recover damages for picketing which is unlawful under state law. The dispute there was between the foreign shipowner and a foreign crew. The dispute here is between an American union and a foreign shipowner. The federal remedy provided American employers under the Taft-Hartley Act was not available to the foreign shipowner in *Benz*. The chart attached to this brief (Appendix B, Appendix p. 7) graphically portrays the substantial American interest in the

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1. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552; *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91.

2. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; *Virginia R. Co. v. System Federation*, 300 U.S. 515; *Graham v. Brotherhood of Firemen*, 338 U.S. 232.

3. *U.S. v. Hutcheson*, 312 U.S. 219; *U.S. v. American Federation of Musicians*, 318 U.S. 741.

4. Merchant Marine Act, 46 U.S.C. § 861 et sequitur. Preference for American Vessels, 46 U.S.C. § 1241; 46 U.S.C. §§ 11, 13, 883.

present dispute, which was lacking in *Benz*. Furthermore, this court in later cases has held a state money damage remedy available despite the existence of a federal remedy.[5]

In any event, the *Benz* case does not deal at all with the Norris-LaGuardia problem. It holds only that the Taft-Hartley Act did not so preempt the field as to deny a damage remedy to a foreign shipowner for picketing unlawful under Oregon law. The foreigner had no federal money damage remedy provided to an American shipowner under the Taft-Hartley Act. Because the foreigner could not recover damages under the Taft-Hartley Act for unlawful picketing, he was allowed a commensurate remedy under Oregon law. The plaintiffs here seek a remedy denied an American shipowner and therefore seek not the same but preferential treatment from an American court.

Our argument on the jurisdictional point is easily stated. This court has held in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) that federal question jurisdiction under 28 U.S.C. Section 1331 may not be predicated upon the assertion of a maritime tort. The effort to distinguish the *Romero* case because here the injunction remedy, not available in admiralty, is sought is unavailing. A similar argument was rejected in the *Romero* case, where the plaintiff sought a jury trial, not available in admiralty.

Finally, defendants urge that no federal law condemns as unlawful the conduct of defendant union in this case. The peaceful, truthful, nonfraudulent and nonviolent picketing of the *SS Nikolos* and the threatened picketing of an American employer to which the *Nikolos* cargo was consigned were lawful under the Clayton Act and may not be considered or held to be violations of any law of the United

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5. *Gonzales v. I.A.M.*, 356 U.S. 617, *Russell v. U.A.W., CIO*, 356 U.S. 634.

States (Clayton Act, 29 U.S.C. § 52). Neither the lower court, the Court of Appeals nor plaintiffs' counsel has cited any authority holding such conduct to be unlawful under federal law. The allegations of the complaint are that the conduct "was an unlawful and coercive conspiracy which violates the plaintiffs' maritime contractual rights in legitimate foreign commerce" and was an unlawful secondary boycott (R. 8). The argument made to the District Court and the Court of Appeals was that the conduct was unlawful as interference with foreign commerce. No authority is cited in support of this contention.

ARGUMENT

I. This Case Involves a Labor Dispute as Defined in the Norris-LaGuardia Act.

In any injunction proceeding against a labor union in a Federal Court to restrain peaceful picketing, at least three problems immediately present themselves:

1. Does the Norris-LaGuardia Act divest the court of power to grant an injunction?

2. On what ground is federal jurisdiction predicated and is the basis for jurisdiction adequately established?

3. Is the conduct sought to be enjoined unlawful and if so, under what law?

Isolation of each problem for separate consideration is difficult as all bear on the basic problem of the court's power to grant the relief requested.

We shall deal first with the applicability of the Norris-LaGuardia Act to the dispute between the parties. Petitioners contend that a labor dispute as defined in that act existed while respondents deny the existence of a labor dispute because petitioners picketed a foreign vessel employing a foreign crew. The entrance of the *Nikolos* into

the salt trade between Mexico and Tacoma, Washington, eliminated an American ship and jobs for petitioners' members. Petitioners' picketing peacefully protested the economic invasion of the *Nikolos* with its substandard wages, hours and working conditions.

The Norris-LaGuardia Act itself makes no exception in favor of foreign corporations nor do we understand respondents to argue that foreign corporations per se are not subject to the restrictions of the Norris-LaGuardia Act. In only one case has this court held the broad restrictions of the Norris-LaGuardia Act inapplicable solely on the ground of the parties involved.[8] In *U. S. v. United Mine Workers*, 330 U.S. 258, this court held the Norris-LaGuardia Act inapplicable to a case in which the United States as employer had taken over operation of the major portion of the country's mines and sought an injunction to restrain a strike. The court points out that the language of the Norris-LaGuardia Act made no express exception. The court says (p. 270-1):

> "By the Norris-LaGuardia Act, Congress divested the federal courts of jurisdiction to issue injunctions in a specified class of cases. It would probably be conceded that the characteristics of the present case would be such as to bring it within that class if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below. So much seems to be found in the express terms of §§ 4 and 13 of the Act, set out in the margin. The specifications in § 13 are in general terms and make no express exception for the United States. From these premises, defendants argue that the restraining order and injunction were forbidden by the Act and were wrongfully issued."

The court then goes on to consider whether a controversy between the United States and its own employees could be

held to be a labor dispute within the meaning of the Norris-LaGuardia Act and concludes that no labor dispute existed. The arguments made in support of non-application of the Act to the United States as sovereign do not apply to a foreign plaintiff. In any event, respondents do not claim that statutes of the United States are not to apply to foreign corporations when they appear as litigants in American courts. Respondents in fact rely on Federal maritime law, both to establish the illegality of petitioners' conduct and the basis for Federal jurisdiction.

The question to be resolved, therefore, is whether or not under Sections 4 and 13 of the Norris-LaGuardia Act the present case involves or grows out of a labor dispute.

Subsection (a) of Section 13 of the Norris-LaGuardia Act provides that a case "shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; * * * or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)." Subsection (b) characterizes a person or association as participating or interested in a labor dispute "if relief is sought against him or it and if he or it * * * has a direct or indirect interest therein." Subsection (c) defines the term "labor dispute" as including "any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer or employee."

These definitions, it is submitted, embrace the controversy here and classify it as one arising out of a dispute defined as a labor dispute.

The evidence shows that the controversy between the parties concerns terms and conditions of employment. MCS, the labor organization representing as collective bargaining agent some 5,000 members employed as unlicensed personnel in the steward's department aboard vessels engaged in the Pacific Coast shipping trade (R. 24-25), is vitally interested in the terms and conditions of employment prevailing on any vessel engaged in that trade. MCS believed that the substantially lower wages paid and inferior conditions maintained on foreign-flag vessels in comparison to the wages and conditions prevailing on American ships operating under union contracts presented a real and present threat to the job security of its members. Indeed, the entry of the *Nikolos* into the coastal trade resulted in the crew of the *Ira Nelson Morris*, including members of MCS, being laid off (R. 25-26). It is reasonably to be anticipated that continuation in this trade pursuant to the contracts for future carriage of similar cargo that have been entered into by the *Nikolos* or other vessels of appellees under foreign registry, will further adversely affect employment of MCS members. As the affidavit and testimony of Willoughby make clear (R. 25-26), and as the court found (R. 36-37), the use of foreign-registered vessels in the coastal trade has caused and will cause loss of business by vessels of American registry under contract to MCS, the necessary effect of which has been and will be loss of employment by MCS members.

Decisions of this court have rejected any narrow or restricted interpretation of the term "labor dispute". In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, at 562-3, this court said that in the Norris-LaGuardia Act the Congress

> "* * * intended that peaceful and orderly dissemination of information by those defined as persons in-

> terested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices."

In that case, an organization of colored persons picketed an employer's establishment protesting the employer's refusal to hire colored clerks. The court answered the contention that this was not a labor dispute because "it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions," by referring to the definitions in Section 13 of the act and concluded that these definitions "plainly embrace the controversy" involved "and classify it as one arising out of a dispute defined as a labor dispute."

Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91, is particularly in point. There, the defendant union of milk wagon drivers picketed retail outlets that obtained their milk from dairies utilizing the so-called "vendor system" of distribution, claiming that the "vendor system" constituted unfair competition, depressed labor standards, and had resulted in less business for dairies employing drivers and loss of employment by drivers. In reversing the Circuit Court of Appeals which had held the activity enjoinable, this court said (*Id.* at pp. 98-9):

> "Whether rightly or wrongly, the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working

conditions commensurate with those imposed under union standards. To say * * * that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife."

The Norris-LaGuardia Act has been held inapplicable by this court in a number of cases in which the Norris-LaGuardia Act was only one of several federal statutes controlling the conduct of the picketing union and an injunction was deemed necessary to carry out the mandate of the other statute. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448, this court upheld an order directing arbitration of a grievance pursuant to the requirements of the collective bargaining contract and held the Norris-LaGuardia Act inapplicable. The court states (pp. 457-8):

"The question remains whether jurisdiction to compel arbitration of grievance disputes is withdrawn by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101: Section 7 of that Act prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of the power to enjoin are listed in § 4. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation, or 'voluntary arbitration.' Though a literal reading might bring the dispute within the terms of the Act (see Cox, Grievance Arbitration in the Federal Courts,

67 Harv. L. Rev. 591, 602-604), we see no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act. Moreover, we held in *Virginian R. Co. v. System Federation,* 300 U.S. 515 and in *Graham v. Brotherhood of Firemen,* 338 U.S. 232, 237, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act. The mandates there involved concerned racial discrimination. Yet those decisions were not based on any peculiarities of the Railway Labor Act. We followed the same course in *Syres v. Oil Workers International Union,* 350 U.S. 892 which was governed by the National Labor Relations Act. There an injunction was sought against racial discrimination in application of a collective bargaining agreement; and we allowed the injunction to issue. The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act."

No Federal statute evinces a Congressional policy to grant preferential treatment to foreign shipowners in an American port. No Congressional mandate requires that a foreigner be entitled to injunctive relief in an American court, or directs preference in our courts to foreign shipowners. Congress on the contrary has encouraged and protected the American Merchant Marine and has sought to restrict competition of foreign registered vessels. Congress has forbade foreign registered vessels to engage in the coastwise trade (46 U.S.C. §§ 11, 13, 883), and has required that at least 50% of all government cargo, and government personnel insofar as possible be carried on American ships (46 U.S.C. § 1241). The basic policy of the United

States to develop and encourage the American Merchant Marine is expressed also in the Merchant Marine Act, 46 U.S.C. § 861, et seq.

The established Congressional policy to favor the American Merchant Marine points to a conclusion that the Congress did not intend to exempt foreign shipowners from the requirements of the Norris-LaGuardia Act.

There remains for consideration the interpretation of this court's decision in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

The *Benz* case and ours present entirely different problems. In *Benz*, plaintiffs sought damages while here they seek an injunction. In *Benz*, the picketing unions had no dispute with the foreign owners. In the present case the petitioners were vitally affected by the intrusion of the *Nikolos* with its substandard wages and working conditions in a trade previously employing petitioner's members. The petitioners by their picketing protested the effect on their membership of the economic invasion of the foreign registered *Nikolos* and by their picketing asked those in sympathy with them not to do business with the *Nikolos*.

An American corporation could not secure an injunction under the facts shown in this record. The foreign plaintiffs (one a wholly owned subsidiary of an American corporation) seek the protection of federal maritime law but desire exemption from the procedural limitations on the availability of the injunctive remedy which apply to American litigants. The *Benz* case imports no general grant of additional remedies for foreign shipowners not available to American shipowners.

The *Benz* case decided only one issue, the applicability of the Taft-Hartley Act, where it was claimed that the federal remedy provided by that law pre-empted a claim for damages.

The only other court case to our knowledge, in addition to the present one, which has interpreted the application of the *Benz* decision to the Norris-LaGuardia Act is *Afran Transport Company v. N.M.U.*, 169 Fed. Supp. 416 (S.D.-N.Y., 1958). District Judge Bryan there stated (p. 424):

> "The plaintiffs claim, however, that *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, and other cases, hold in substance that the provisions of the Norris-LaGuardia Act do not apply to them because their vessels, temporarily in American ports, are foreign ships operated entirely by foreign seamen. It does not seem to me that either the *Benz case* or the other cases cited by the plaintiffs so hold.
>
> "The *Benz case* merely held that the Taft-Hartley Act did not preempt the field of labor relations to the extent that a suit for damages for picketing of such a foreign vessel by an American union under local state law was forbidden. In the *Benz case* the Supreme Court was not dealing with an injunction. The question was merely whether the exclusive remedy of the aggrieved party, in this case the owner of a foreign vessel, was under the Taft-Hartley Act and therefore relief could not be sought under state law. The court held, in substance, that the Taft-Hartley Act was not applicable to wage disputes arising on foreign vessels between the nations of other countries when the vessel is temporarily within our territorial waters. It stated that an affirmative intention of Congress, clearly expressed, was necessary in order 'for us to run interference in such a delicate field of international relations.'
>
> "But it by no means held that the sweeping policy announced by Congress in the Norris-LaGuardia Act for the protection of American union activities from injunction should be withheld where there was a legitimate labor dispute merely because foreign vessels or crews were affected."

As pointed out by Judge Bryan, the narrow holding of the *Benz* case was that the Taft-Hartley Act did not so

preempt the field as to prevent a suit for damage for picketing of a foreign vessel by an American union which was unlawful under Oregon law. The only question was whether the exclusive remedy of the plaintiff was under the Taft-Hartley Act as contended by the defendant union. Decisions of this court since *Benz* have denied preemption and permitted a judgment for money damages for union conduct unlawful under state law even though a Taft-Hartley remedy was available. *Gonzales v. I.A.M.*, 356 U.S. 617, *Russell v. U.A.W., CIO*, 356 U.S. 634.

Furthermore, the National Labor Relations Board in *Peninsular & Occidental Steamship Co.*, 120 N.L.R.B. 1097 took jurisdiction over a foreign flag vessel with a foreign crew and directed an election where it appeared that substantial American interests were involved. In the present case the record as graphically summarized in the chart, Appendix B, Appendix p. 7, shows substantial American connection with the present dispute. It could well be therefore that the Taft-Hartley Act would apply to the facts of the present case. Certainly the American interests in this dispute are much greater than existed in the *Benz* case.

This court in the *Benz* case points out in the following extract that normally a foreign vessel entering an American port subjects itself to American laws and jurisdiction (353 U.S. at 142):

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing.
>
> "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects

itself to the laws and jurisdiction of that country. *Wildenhus' Case*, 120 U.S. 1 (1887). The exercise of that jurisdiction is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923). It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The question here therefore narrows to one of intent of the Congress as to the coverage of the Act."

The considerations which impelled this court to hold the Taft-Hartley Act inapplicable to the facts in the *Benz* case do not exist in this case. In *Benz* this court allowed a foreign shipowner a damage remedy under state law in place of a damage remedy under the Taft-Hartley Act which was held not available to him. However, if the Norris-LaGuardia Act is held inapplicable to a foreign shipowner, while applied when an American shipowner is plaintiff, a foreigner will be granted preferential treatment, not the same treatment, as an American.

Furthermore, since there was no substantive Federal labor law when the Norris-LaGuardia Act was passed, the existence or non-existence of other remedies was immaterial to Congress. Congress simply withdrew the Federal Court injunction as a form of relief. The Court of Appeals thought that since the respondents were denied the administrative remedies of the Taft-Hartley Act under the *Benz* decision, it was significant that the application of the Norris-LaGuardia Act would deprive respondents of a federal agency in which they could seek protection (265 F.2d at 787; R. 151). But the Norris-LaGuardia Act was

passed at a time when there was no federal administrative remedy available to any litigant in a labor matter. Nonetheless all such litigants were denied the right to injunctive remedies and were left to such other remedies as might be available.

Respondents contend that the remedy of a Federal Court injunction which was withdrawn from all other employers was by implication reserved to foreign employers. Had Congress intended to carve out a special class of litigants or a special class of employers who were to be entitled to a remedy which it denied broadly to all litigants, it easily could have said so.

In the Norris-LaGuardia Act Congress was regulating the District Courts, not the litigants or their rights. In the absence of Congress' expression to the contrary, there is no reason to assume that it regulated the District Courts in one respect for one class of litigants and in another respect for another class of litigants.

The reasoning of this Court in the *Benz* decision is wholly consistent with, and in fact supports, this approach. The Court indicated that the reason for holding the Taft-Hartley Act not applicable was that to do so would be to give it "foreign applicability". However, to give effect to the Norris-LaGuardia Act in the instant case, gives it no "foreign applicability" at all. Its application is limited to the confines of the jurisdiction of the United States District Court for it does not govern any relationship of the employer and the crew, nor any relationship between the employer and this union other than to say that the United States District Court may not issue an injunction in a labor dispute between them. To hold the Norris-LaGuardia Act applicable in the present case is to do no more than say that a foreign shipowner doing business in

the ports of the United States of America has no greater right to injunctive relief in the United States District Court in a case involving a labor dispute than an American shipowner. To so hold would not give the Norris-LaGuardia Act any "foreign applicability" as would have the application of the Taft-Hartley Act in the *Benz* decision.

No foreign shipowner could invoke the jurisdiction of the United States District Court and assert that because he is a foreigner he is entitled to imprisonment of the defendant for debt to collect a judgment or that he is immune to the defendant's interrogatories under the Federal Rules of Civil Procedure. Yet this would not differ in any respect from the position of the plaintiff shipowners in the case at bar that they are not subject to the limitations on remedies which are applicable to all other litigants in all other like cases.

The District Court was not as confident as the Court of Appeals that the *Benz* case was controlling. After saying that he doubted the applicability of the Norris-LaGuardia Act, the District Judge continued on to say that he believed he was justified in issuing an injunction under § 107 of the Act (R. 121, 122). (The Court was referring to 29 U.S.C. § 107, 47 Stat. 71). In this, of course, the District Court was in error because the instant case falls squarely within the total prohibitions of § 104 (29 U.S.C. § 104, 47 Stat. 70). Section 107 referred to by the Court is called into play only if there is some allegation or claim of violence, fraud or unlawful acts in the course of the dispute. *New Negro Alliance v. Sanitary Grocery Company*, 303 U.S. 552; *Taxi Cab Drivers v. Yellow Cab Operating Company*, 123 F.2d 262 (C.A. 10, 1941); *Wilson & Co. v. Birl*, 105 F.2d 948 (C.A. 3, 1939); *Brotherhood of RR Trainmen v. Cent. of Ga. RR.* 229 F.2d 901 (C.A. 5, 1956).

If the Norris-LaGuardia Act applies, the conduct of defendants was lawful under Federal law and an American shipowner could not secure an injunction. That the Clayton Act here makes the petitioners' conduct lawful is made abundantly clear by *U. S. v. Hutcheson*, 312 U.S. 219. In Footnote 1 to that opinion, the Supreme Court quotes the statute in full, the last sentence of which, referring to peaceful picketing, reads as follows:

> "* * * nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The court said at pages 235-6, of that opinion:

> "The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress though it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. 'The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, 38 Stat. L. 738, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.' H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering, supra*, and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*, 274 U.S. 37, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. *In this light § 20 removes all such allowable*

conduct from the taint of being 'violations of any law of the United States' including the Sherman Law." (Emphasis supplied.)

To the same effect is *U. S. v. American Federation of Musicians*, 318 U.S. 741.

In conclusion, therefore, it is respectfully submitted that the Norris-LaGuardia Act is applicable to the dispute between the parties in this case, that the *Benz* case is not authority to the contrary, and that under applicable Federal law the conduct of defendants was lawful. The injunction therefore should not have been granted.

II. The Decision of the Court of Appeals Is Directly Contrary to Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

There is no disagreement as to the following:

(a) If there is a cause of action in this case it is one for maritime tort.

The majority opinion of the Court of Appeals says:

"* * * [A]ppellees' cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract *constituting maritime torts.*" (Emphasis supplied.) (265 F.2d at 782; R. 144)

The concurring opinion in the Court of Appeals says:

"Here the relief sought was injunction *against a maritime tort.*" (Emphasis supplied.) (265 F.2d at 787; R. 152)

(b) Respondents' sole claim to jurisdiction rests upon the provisions of 28 U.S.C., Section 1331, giving the United States District Court jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Respondents disclaimed any other basis of jurisdiction of the District Court.

The Court of Appeals noted in its opinion:

> "Appellee rests his claim of jurisdiction on 28 USCA § 1331. * * *" (265 F.2d at 782; R. 143)

(c) This court held in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), that an action at law cannot be brought under Section 1331 on the civil side of a United States district court on a cause of action on a maritime tort.

The court below has concluded that an action on the civil side of the court requesting an equitable remedy rather than a common law remedy based on a maritime tort can be brought under Section 1331.

The court below reasoned that this is not a "case of admiralty and maritime jurisdiction" as that language is used in 28 U.S.C., Section 1333 or Article III of the Constitution but is instead a "case" in equity because an injunction is sought even though Federal question jurisdiction is predicated solely on a claim of maritime tort.

This court in *Romero* decided that if the suit involved a maritime claim, i.e., a maritime tort, it was a case of admiralty and maritime jurisdiction. This court specifically pointed out that this was so regardless of the remedy sought by the pleader. This language is to be found in footnote 23 to the majority opinion in the *Romero* decision.

> "All suits involving maritime claims, *regardless of the remedy sought*, are cases of admiralty and maritime jurisdiction within the meaning of Article 3 whether they are asserted in the Federal courts, or under the saving clause, in the state courts." (Emphasis supplied.) (358 U.S. at 367)

The court below failed to consider that there is no grant of jurisdiction, equitable or otherwise, to the United States

District Courts over "maritime torts" as such. The only grant of jurisdiction over maritime torts is in Section 1333, over "any civil case of admiralty or maritime jurisdiction." To deny that this is a "case of admiralty and maritime jurisdiction" is therefore to deny that it falls within any grant of judicial authority to the Federal courts.

The majority decision of the court below states:

> "We emphasize, this is not an action 'saved' from the exclusive jurisdiction of admiralty; it is one never cognizable in admiralty." 265 F.2d at 783.[6] (R. 145)

If this be so, the plaintiffs here had no Federal claim at all, for their only claim to Federal jurisdiction is that the case *is* cognizable in admiralty. This Court made this same observation in footnote 23 to the majority opinion in *Romero*, saying:

> "Without that Constitutional grant *Romero* would have no Federal claim to assert." (358 U.S. at 368)

In *Romero*, the plaintiffs sought a jury trial not available in admiralty and for that reason urged jurisdiction on the law side of the Federal Court where a jury trial would be available. Similarly, plaintiffs in our case seek an injunction not available in admiralty and base their claim for jurisdiction on the law side solely because only there may the remedy of injunction be given. Jurisdiction is not conferred in such a fashion.

The result reached by the court below is that if the remedy sought on a maritime tort is the equitable remedy of an injunction, the jurisdiction of the district court under

---

6. On the contrary, equitable actions based on maritime claims have been held to be within the saving clause. *Moore v. Purse Seine Net*, 18 Cal. 2d 835, 837 and cases cited, affirmed sub nom, *C. J. Hendry Co. v. Moore*, 318 U.S. 133; *Oil Workers International Union v. Superior Court*, 103 Cal. App. 2d 512, 576-7. See also, note in 73 Harvard Law Review 84,141 (1959).

Section 1331 is different and greater than a similar action on the civil side of the court seeking a common-law remedy on a maritime tort. Congress made no distinction in Section 1331 between the jurisdiction of the court sitting in equity or sitting in law. The statute presently grants jurisdiction to the court of "all civil actions wherein the matter * * * arises under the * * * laws * * * of the United States." However, in the original Act of 1875, as quoted by this Court in the *Romero* decision (358 U.S. 354, 367), the Act granted jurisdiction over "suits of a civil nature at common law or in equity." The jurisdictional grant of the statute was identical as to actions in equity and at law. The change to the words "all civil actions" was made solely because of the adoption of Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between actions at law and in equity. See reviser's notes to 28 U.S.C., Section 1331.

A litigant asserting jurisdiction under Section 1331 must designate the "law of the United States" under which his suit arises whether the remedy sought be legal or equitable. In the *Romero* case, this Court has said that claims rooted in Federal maritime law are not cases arising under the laws of the United States within the meaning of Section 1331.

The respondents' claim to jurisdiction under Section 1331 therefore must fail, and the contrary decision of the Court of Appeals cannot be reconciled with the decision of this Court in the *Romero* case.

III. Petitioners' Conduct Was Not Unlawful.

The Court of Appeals declined to pass on petitioners' claim that their conduct which was enjoined by the District Court was not unlawful under federal law. Petitioners believe this question is fundamental to the whole case and

cannot be avoided. If petitioners' conduct was lawful an injunction should not have been granted.

The Court of Appeals appears to assume a violation of some federal law by the petitioners' peaceful picketing. The only direct reference to the problem in the opinion below is at page 782 of 265 F.2d (R. 144) where the court states that "appellee's cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract constituting maritime torts."

We have argued above (p. 23-4) that under the express provisions of the Clayton Act, petitioners' conduct was lawful. Respondents urge that the Clayton Act may not be relied on to determine the legality of petitioners' conduct because no labor dispute as defined in the Norris-LaGuardia Act exists and therefore neither the Norris-LaGuardia Act nor the Clayton Act are applicable. If the Clayton Act is not to be applied, respondents still must point to some statute or some line of authority holding petitioners' peaceful picketing to be unlawful. No federal case is cited by respondents or by the courts below condemning conduct similar to petitioners' as unlawful nor do petitioners know of any such case. As we have pointed out elsewhere in this brief, petitioners' objective in picketing the *Nikolos* was to protest the loss of employment of petitioners' members resulting from the replacement of an American vessel by the foreign vessel. The union's purpose and objective was to forward the economic interests of its membership and the means used were not unlawful. In the absence of other controlling authority the congressionally established policy found in the Clayton Act should govern in determining the legality of petitioners' conduct. It would be anomalous to hold inapplicable a statute expressing a congressional pol-

icy that conduct was lawful and to determine such conduct to be unlawful *per se* on the basis of federal common law.[7]

If petitioners' conduct was not unlawful under federal law, the injunction was improperly granted.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the District Court with instructions to vacate the temporary injunction and dismiss the action.

Respectfully submitted,

JOHN PAUL JENNINGS
J. DUANE VANCE
Counsel for Petitioners

Dated: January 7, 1960.

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7. The question of whether or not the right of petitioners to picket peacefully is constitutionally protected under the decision of this court in *A.F. of L. v. Swing*, 312 U.S. 568, was not argued before the District Court and is not argued here. Petitioners' counsel relied on the Norris-LaGuardia Act and the Clayton Act believing those statutes to be controlling.

(Appendices follow)

Appendix A

U. S. Constitution, Article III, Section 2, Clause 1. Subjects of jurisdiction.—The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

TITLE 28 U.S. CODE, SECTION 1331

Section 1331. *Federal question—Amount in controversy.*—The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. (June 25, 1948, c. 646, § 1, 62 Stat. 930.)

NORRIS-LaGUARDIA ACT (TITLE 29, U.S. CODE)

Section 101. *Injunction prohibited except as herein provided.*—No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; • • • (Mar. 23, 1932, c. 90, § 1, 47 Stat. 70.)

Section 102. *Public policy of United States.*—In the interpretation of this Act [§ 101 et seq. of this title] and in

determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection: therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. (Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.)

Section 104. *Grounds for injunction limited.*—No court of the United States shall have jurisdiction to issue any retraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; * * * (Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.)

Section 107. *Hearing on sworn complaints* * * *.—No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 101-115 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

* * * * *

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complaintant's property: * * * (Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.)

Section 113. *What constitutes labor dispute—Participants—Courts included.*—When used in sections 101-115 of this title, and for the purposes of such sections—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. (Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.)

CLAYTON ACT (TITLE 29, U.S. CODE, SECTIONS 52, 53)

Section 52. *Statutory restriction of injunctive relief.*— No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from pay-

ing or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. (Oct. 15, 1914, c. 323, § 20; 38 Stat. 738.)

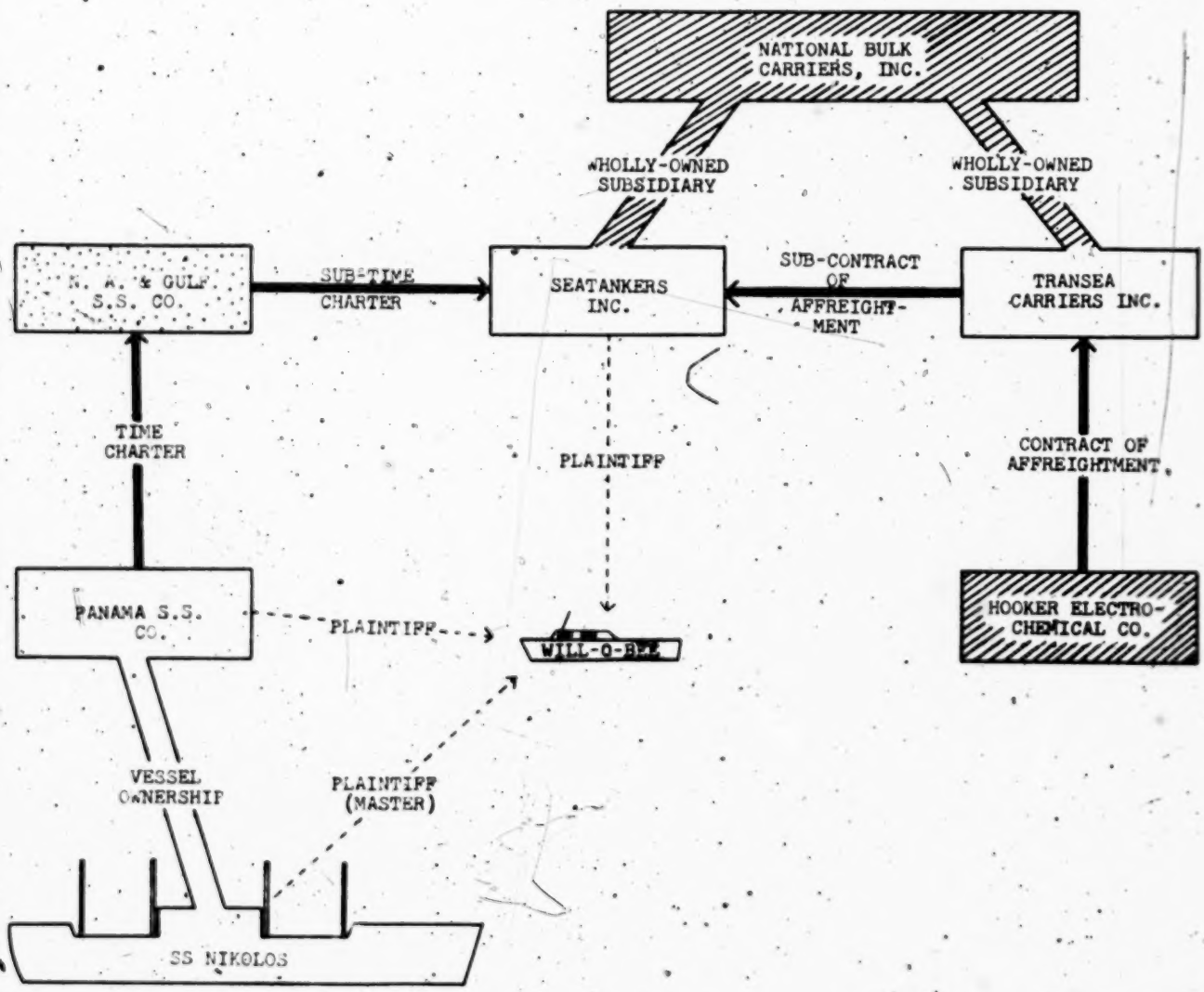
Section 53. *"Person" or "persons" defined.*—The word "person" or "persons" wherever used in this act [§ 52 of this title] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (Oct. 15, 1914, c. 323, § 1, 38 Stat. 730.)

Appendix B

THE STRUCTURE OF THE LITIGATION

PLAINTIFFS: PANAMA S.S. CO., SEATANKERS INC., AND THE MASTER OF THE S.S. NIKOLOS

DEFENDANTS: MARINE COOKS & STEWARDS, AFL, AND THE INDIVIDUAL OPERATORS OF THE WILL-O-BEE



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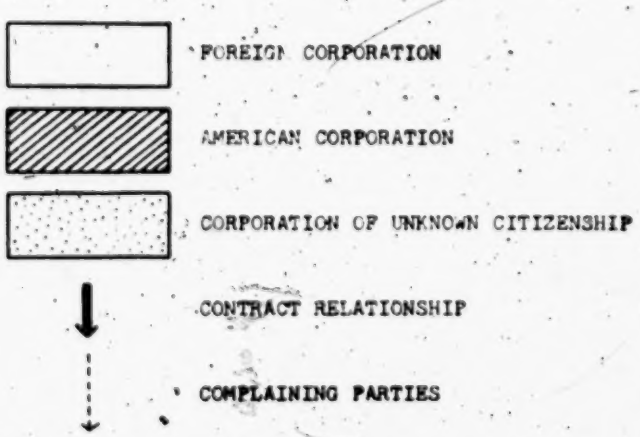

THE SS NIKOLOS IS OF LIBERIAN REGISTRY

Based on record references shown on pp. 4 and 5 of Brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,

Petitioners,

v.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,

Respondents.

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOHN D. MOSSER,
Wood, Matthiessen, Wood & Tatum
1310 Yeon Building,
Portland 4, Oregon,
CHARLES B. HOWARD,
Summers, Bucey & Howard,
Central Building,
Seattle 4, Washington,
Counsel for Respondents.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-60

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In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,

Petitioners,

v.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,

Respondents.

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATUTES AND TREATY PROVISIONS INVOLVED

In addition to the statutes cited by petitioners and included in the appendices to their brief, respondents believe the following statutes and treaty provisions relevant to the decision of this case:

Title 28 U.S.C. Section 1333

Sec. 1333. *Admiralty, maritime and prize cases.*— The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

(June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, Sec. 79, 63 Stat. 101.)

Title 28 U.S.C. Section 1350

Sec. 1350. *Alien's action for tort.*— The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. (June 25, 1948, c. 646, 62 Stat. 934.)

Treaty Of Friendship, Commerce, And Navigation Between The United States And The Republic Of Liberia, Signed At Monrovia, August 8, 1938

* * *

Article VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation. (54 Stat. 1742)

* * *

Article XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party who flag is flown. (54 Stat. 1745)

QUESTIONS PRESENTED

On the complaint of the Liberian corporate shipowner, Liberian corporate time charterer and Greek master of the Liberian Flag vessel, SS Nikolos, the district court enjoined an American union and its members from picketing that ship while temporarily present at an American port for the purpose of discharging a cargo loaded abroad. The picketing was in protest of the wages and working conditions aboard the vessel, which were below those prevailing on competing United States flag vessels on which the union's members were employed. The wages and working conditions were satisfactory to the Nikolos' entirely alien and predominately Greek crew and were both in accord with the provisions of the ship's articles which had been opened abroad under Liberian law and in accord with an agreement between the shipowner and various Greek unions. The questions presented are:

1. Did the district court have jurisdiction and injunctive power in this case:

(a) Under 28 U.S.C. Section 1333, because of petitioners' intentional interference with respondents' maritime contractual rights and the movement of a vessel on navigable waters; or, if admiralty has not adequate equitable remedial power, under 28 U.S.C. Section 1331, because of applicable federal maritime law derived from Article III, Section 2 of the Constitution? (The court of appeals answered, "No" to the former alternative, "Yes" to the latter.)

(b) Under 28 U.S.C. Section 1350, as a civil action by aliens for tort in violation of their maritime rights derived from the law of nations? (Not considered below.)

(c) Under both 28 U.S.C. Section 1331 and Section 1350, as a civil action for tort by aliens for violation of their rights arising under a Treaty? (Not considered below.)

2. Absent any expression of extra-territorial intent by Congress, may the literal sweep of the Norris-La-Guardia Act definition of "labor dispute" be applied to a dispute over terms and conditions of employment by a foreign shipowner of alien seamen under shipping articles opened abroad under foreign law for service aboard a foreign flag vessel, merely because that vessel is transiently in a United States port on an international voyage and competes with United States flag vessels on which American labor is employed? (The court of appeals held not.)

STATEMENT OF THE CASE

The SS Nikolos was a merchant vessel registered under the Liberian flag. It arrived at the Port of Tacoma, Washington on June 10, 1957, to discharge a full cargo of bulk salt which it had loaded in Mexico. (Findings V and VII, Tr. 32, 33)

It was intercepted in the harbor by the Will-O-Bee, a small cabin cruiser owned and operated by some of petitioners. This began to circle about the Nikolos displaying signs "PICKET BOAT" (Findings IX and X, Tr. 33). Later an additional sign was displayed reading, "AFL-CIO seamen protest loss of their livelihood to foreign flag ships with sub-standard wages or sub-standard conditions" (Tr. 60).

Petitioners also threatened the consignee of the cargo with establishment of a picket line at its dock if it allowed the Nikolos to berth there (Finding XI, Tr. 33).

Petitioners' activities had their intended effect: the consignee of the salt refused the ship a berth at its dock, tugs declined to assist the vessel to a berth, and the Nikolos was forced to remain at anchor in the harbor (Findings XII, XIV and XV, Tr. 34).

Respondents Panama Steamship Company, Ltd., Seatankers, Inc. and Socrates Paleocrassas, respectively the owner, time charterer and master of the Nikolos (Findings I, II and III, Tr. 31), then filed a complaint (Tr. 3-10) in the United States District Court for the Western District of Washington, Southern Division,

seeking damages and temporary and permanent injunctive relief against petitioners. An order to show cause why a temporary injunction should not be granted issued (R. 22-23) and extensive hearings were held, at which petitioners' sole contention was that the existence of a "labor dispute" within the meaning of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq, deprived the Court of jurisdiction to issue an injunction.

The respondents are all aliens (Findings I, II, III, Tr. 31), the shipowner and time charterer being incorporated under the laws of Liberia (Tr. 88, 91) and the master a Greek citizen (Tr. 13).

The crew of the vessel were all aliens serving under articles of employment made subject to the laws of Liberia (Finding VI, Tr. 32). The evidence was that the crew were predominately Greek nationals (Tr. 13) and members of Greek maritime unions (Tr. 69-70). The wage scale on the vessel equaled or exceeded those specified in a labor agreement to which the Greek unions and the owners were parties (Tr. 14); but were far below those paid on United States flag vessels on which members of the union petitioner worked (Tr. 113). There was no dispute between respondent and the crew of the vessel (Tr. 14).

Petitioners did not even claim that there was and expressly disclaimed any contact or affiliation with the crew members (Tr. 28). Rather, petitioners' claim of "labor dispute" was based on the undisputed facts that their activities were without fraud or violence (Finding XXIII, Tr. 36) and that, as a result of the shipment

of salt from Mexico aboard the Nikolos and proposed shipments aboard other foreign flag vessels, American flag vessels manned under contracts with American unions had lost or would lose such business with resultant loss of employment opportunities to members of these American unions, including petitioner Marine Cooks and Stewards (Finding XXIV. Tr. 36-37).

The court found, however, that petitioners' activities constituted "acts of unlawful interference with international commerce and particularly the right of plaintiffs to carry out an international voyage and maritime contract of affreightment with a vessel lawfully registered by a friendly foreign nation manned by an alien crew under foreign shipping articles" (Finding XIII, Tr. 34). It concluded that "the term 'labor dispute' as used in the Norris-LaGuardia Act does not contemplate a dispute foreign in nature" (Conclusion II, Tr. 37).

Finding substantial and irreparable damage to respondents (Findings XV, XVII, Tr. 34, 35), as well as irreparable damage to the obligations and relations of the United States with friendly maritime nations (Finding XVIII, Tr. 35) and that no remedy existed at law (Finding XXI, Tr. 36), the district court issued an interlocutory injunction (Tr. 40-43). At the request of petitioners' counsel (Tr. 134), this enjoined picketing or otherwise interfering with discharge of cargoes not only from the Nikolos but also from other foreign flag vessels, manned by aliens under foreign articles and owned, operated or chartered by respondents.

Appealing from this, petitioners at first placed sole

reliance on the Norris-LaGuardia Act (Tr. 137). The Court of Appeals for the Ninth Circuit found, as this Court had of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141 et seq in *Benz v. Compania Naviera Hidalgo S.A.* (1957), 335 U.S. 138, that, "the whole background of the Act is concerned with industrial strife between American employers and employees," and held the Act inapplicable to labor disputes arising solely out of conditions on a foreign vessel.

The court of appeals also dealt with a contention that the district court lacked jurisdiction of the complaint, which petitioners had raised by supplemental briefs and in oral argument. It found jurisdiction under 28 U.S.C. Section 1331, holding that the case arose under the Constitution and laws of the United States because of the federal nature of respondents' maritime rights infringed by petitioners. It distinguished *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), which held that a seaman's maritime tort action for personal injuries was not intended to be within a district court's jurisdiction under 28 U.S.C. Section 1331 because a completely adequate jurisdiction for it existed in admiralty under 28 U.S.C. Section 1333. The court of appeals held that admiralty could not issue an injunction and therefore did not provide a completely adequate jurisdiction for this case.

By petition for rehearing, petitioners for the first time challenged the district court's finding that respondent Seatankers, Inc. was a foreign corporation and also for the first time contended that the Clayton

Act, 38 Stat. 738, 29 U.S.C. § 52, prevented their conduct from being unlawful. By *per curiam* opinion the court of appeals held these questions not properly before it, but left them for consideration of the district court in proceedings for damages or permanent injunctive relief.

Petitioners then sought the writ of certiorari, which the Court granted.

SUMMARY OF ARGUMENT

The Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Liberia, 54 Stat. 1739, requires recognition of the SS Nikolos as a Liberian vessel while in territorial waters of the United States and establishes the right of respondents to engage in commerce with that vessel and its cargo in our ports.

The court of appeals correctly held that petitioners' intentional interference with the movement of the vessel and the maritime contracts entered into by respondents constituted a tort under federal maritime law, *The Poznan*, 276 Fed. 418 (S.D. N.Y., 1921); *Sidney Blumenthal & Co., Inc. v. United States*, 30 F.2d 247 (2 Cir., 1929), *cert. den.* 279 U.S. 847.

Admiralty jurisdiction of respondents' suit for this maritime tort would unquestionably exist under 28 U.S.C. Section 1333 were they seeking only a remedy in money damages. If that were the case, under the decision of this Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the applicability of

federal maritime law would not warrant alternative jurisdiction under 28 U.S.C. Section 1331. The question of jurisdiction under those sections arises here, however, because respondents sought not just damages but also injunctive relief, which was awarded.

The court of appeals held that such relief could not be awarded in admiralty under Section 1333. In this it followed the statements of this Court in *The Eclipse*, 135 U.S. 599 (1890) and *Schoenamsgruber v. Hamburg-American Line*, 294 U.S. 454 (1935). Those statements, however, are dictum, or as the Court has described them "loose talk," *Swift and Company Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950). In that case the Court held that equitable relief could be granted in admiralty when sought, "in the course of admiralty's exercise of its jurisdiction over a matter exclusively maritime." This is also the plain meaning of the statements in *Romero* that, "All suits involving maritime claims, regardless of the remedy sought, are cases of admiralty and maritime jurisdiction . . ." and, "The federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law."

That respondents' pleading was labeled "complaint" instead of "libel," a misnomer affecting no substantive or procedural right, will not defeat this jurisdiction, *Confiscation Cases*, 87 U.S. 92 (1874).

If, however, equity may not enjoin even the restrainable activities of petitioners committed on navigable waters and infringing respondents' maritime contractual

rights, then the reasoning of *Romero* is inapposite to deny the district court jurisdiction under Section 1331 in this case. *Romero* recognized that a maritime tort claim was governed by federal law derived from Article III, Section 2 of the Constitution. A bare majority, nevertheless, felt that Congress did not intend such to be a case within the plainly descriptive "all civil actions . . . wherein the matter in controversy . . . arises under the Constitution, laws . . . of the United States," because of the "long established, smoothly functioning" and "completely adequate" admiralty jurisdiction. Such would not be the case here.

Nor should the Court's expressed concern for preserving a concurrent state forum apply to make the state courts the exclusive forum for adequate vindication of important federal rights.

Two bases of jurisdiction, independent of those already discussed, exist. First, the maritime law is derived from the law of nations, *De Lovio v. Boit*, Fed. Case No. 3776; *Lauritzen v. Larsen*, 345 U.S. 571 (1952); and this is a "civil action by an alien for tort only, committed in violation of the law of nations," for which jurisdiction is provided by 28 U.S.C. Section 1350. Second, both that section and Section 1331 provide jurisdiction of a tort action for violation of treaty rights. A treaty of friendship, commerce and navigation is self executing and an alien may sue to restrain infringement of a right to engage in commerce granted under it. *Asakura v. Seattle*, 265 U.S. 332 (1924). Respondents did so here.

The literally universal language of American labor legislation has always been construed to affect only employment within the territorial limits of the United States unless Congress clearly expressed a broader coverage. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *Foley Bros. Inc. v. Filardo*, 336 U.S. 281 (1949); *Air Line Dispatchers Ass'n. v. National Mediation Board*, 189 F.2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849. Similarly, United States laws will not be construed so as to affect the internal economy of a foreign flag vessel without explicit direction by Congress, *Benz v. Compania Naviera Hidalgo*, supra; *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, supra. Petitioners ignore these canons of construction in asking that the universal definition of "labor dispute" in the Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. Section 113 (c) be applied to their efforts to change the terms and conditions of employment aboard a foreign flag vessel only transiently in our waters on an international voyage.

The Norris-LaGuardia Act contains no express statement that it is to be applicable to disputes involving employment on foreign ships or in foreign commerce generally. Its legislative history clearly limits the intent of Congress to disputes affecting the employment of workingmen in our own country. The definition of "labor dispute" in the Act is virtually identical to that in the Taft-Hartley Act, which the Court confined to domestic limits in the *Benz* case.

The decisions of this Court interpreting the term "labor dispute" in the Act which petitioners cite all

deal with domestic disputes and furnish no support for extra-territorial application. In fact two of these, *United States v. United Mine Workers*, 330 U.S. 258 (1947) and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), show that the Act is not applied even to domestic disputes within its literal sweep but outside the Congressional purpose.

Section 20 of the Clayton Act, 29 U.S.C. Section 52, is, as petitioners' brief admits, applicable here only, "if the Norris-LaGuardia Act applies." It furnishes no independent protection to their activities, only such as comes from its implied amendment by the Norris-LaGuardia Act, *United States v. Hutcheson*, 312 U.S. 219 (1940). Since, however, where Norris-LaGuardia does apply it thus affects substantive rights, petitioners are wrong in stating that it regulates only "the District Courts, not litigants or their rights."

There are no substantial American interests here which warrant application of American labor legislation. The consignee of the cargo was American; but there will be American shippers or consignees of cargo on nearly every foreign vessel which comes to our ports. Equally every foreign ship in our ports is in competition with United States flag vessels organized by American union labor. These factors were present, but not deemed significant, in *Benz*. Petitioners urge that the foreign corporate time charterer be considered American because of American stockholdings in it. The time charterer, had, however, no control of the labor conditions on the vessel. The shipowner, not it, hired and paid the crew.

Respondents seek no special privilege for a foreign shipowner or employer as such. Obviously our laws apply to an alien employer of labor in the United States. They do not apply, without specific direction of Congress, to an American employer of workmen, even American workmen, in foreign employment, *Foley Bros., Inc. v. Filardo,* supra. If an American corporation were in the place of respondents there would still be no labor dispute in this case, because the employment is aboard a foreign flag vessel only transiently in our waters on an international voyage.

Congressional legislation to provide subsidies and other protection for the American Merchant Marine is expressly limited in scope and recognizes the fact of foreign flag competition. If petitioners wish to enlarge that protection they should address themselves to Congress, not the Courts, *Lauritzen v. Larsen,* supra.

ARGUMENT

I. The District Court Had Jurisdiction Of This Cause Under 28 U.S.C. Sections 1331, 1333 And 1350.

Petitioners urge that the decision of this Court in *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959) requires dismissal of this case for lack of jurisdiction of the subject matter in the District Court under either 28 U.S.C. Section 1331 or Section 1333. Not only does no reasonable reading of that decision require such a result, but there is here an alternative basis of jurisdiction under 28 U.S.C. Section 1350. Before exam-

ining the *Romero* decision, it is well to review the nature of the subject matter of this suit.

A. *Petitioners' Interference With Respondents' Right To Engage In International Maritime Commerce Was Tortious.*

The SS Nikolos, Liberian vessel, entered the harbor of Tacoma, Washington with a cargo of salt loaded in Mexico and to be discharged at a dock of the consignee of the cargo, Hooker Electro Chemical Company (Finding V, Tr. 32). As a registered Liberian vessel in territorial waters of the United States, its status as a Liberian vessel must be recognized under Article XV of the Treaty of Friendship, Commerce and Navigation Between the United States and the Republic of Liberia, 54 Stat. 1739:

"ARTICLE XV

"Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." (54 Stat. 1745)

The Nikolos was owned by respondent Panama Steamship Company and under time charter to respondent Seatankers, Inc., both Liberian corporations (Findings I and II, Tr. 31 and Tr. 88, 91). The right of these alien corporations to thus engage in commerce arises under the same Treaty between this country and Liberia:

"ARTICLE VII

"Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation." (54 Stat. 1742)

The activities of the petitioners in operating a picket boat on the navigable waters of the harbor and about the SS Nikolos induced the crew of a tug to refuse to assist the vessel to a discharge berth. In addition, petitioners' threats of a picket line at the consignee's plant and its resultant fear of disruption of plant operations induced it to refuse to provide a berth for discharge as required by its contract of affreightment (Finding XIV, Tr. 34). The Court found these to be the intended results of petitioners' activities (Finding XII, Tr. 34). While petitioners made no concrete demands the meeting of which would result in their discontinuance of these activities, it is clear from the affidavit (Tr. 24-29) of petitioner Willoughby that they would have been satisfied with nothing less than abrogation of another existing maritime contract, the articles of employment aboard the vessel.

Intentional interference with maritime shipment and contracts constitutes a maritime tort of which admiralty has jurisdiction, as the court below held (265 F.2d at 782, Tr. 144). In *The Poznan*, 276 Fed. 418 (S.D. N.Y., 1921) the suit was by the shippers of cargo aboard the

vessel against the owner of the vessel for inducing the breach of contracts of shipment entered into between the charterer of the vessel and the shippers. Judge Learned Hand held:

> "Now it is well settled law in federal courts that where a third party procures an obligor to break a contract, he commits a tort against the obligee. Angle v. Chic., etc., Co., 151 U.S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Bitterman v. Louisville, etc., R. R., 207 U.S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693. In short, the rule first laid down in Lumley v. Gye, 2 E. & B. 216, has been fully accepted, and is even extended beyond cases where the injured party has a contract.
>
> * * *
>
> "Was it, then a martime tort over which the admiralty will take jurisdiction? Confessedly, that question depends rather on historical than a priori considerations. Ordinarily it is the locus of the tort which governs, and where the injury is on the water though the defendant's act was on the land, that locus is determined by the water. Hermann v. Port Blakely Mill Co. (D.C.) 69 Fed. 646; Atlee v. Packet Co., 21 Wall. 389, 22 L. Ed. 619; The Normannia (D.C.) 62 Fed. 469, 472; Greenwood v. Westport (D.C.) 60 Fed. 560. Perhaps, not every tort committed at sea is within the jurisdiction of an admiralty court. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 60, 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L.R.A. (N.S.) 1157. At least for the purposes of this case I may assume that the injury must be maritime in its character as much as though the case sounded in contract. The injury here was the breach of contract of carriage itself, the effective cause of which was the act of the Polish Company. Obviously if that contract was maritime enough in its character to base a libel upon it in contract, the injury resulting from the wrongful act on shore was as maritime, because it was the same thing." (276 Fed. at 433-434)

Again in *Sidney Blumenthal and Co., Inc. v. United States*, 30 F. 2d 247 (2 Cir., 1929), *cert. den.* 279 U.S. 847, that court of appeals held that a third party who prevented the performance of a bill of lading by deliberate transshipment of the goods covered was liable to the shipper. It held:

> "The jurisdiction of the admiralty over such a tort admits of no question: it took place upon navigable waters, which is prima facie the test. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 34 S. Ct. 733, 58 L. Ed. 1209, 51 L.R.A. (N.S.) 1157. It is true that in that case the question was left open whether there might not be torts committed on the water of which the admiralty would not take cognizance. Assuming as much, and that therefore the quality of the act may at times be determinative, this was a maritime transaction; it was a part of the carriage of goods by sea, unauthorized, indeed, and so wrongful, but no different for that reason from any other carriage. If any tort be maritime, certainly this was one." (30 F. 2d at 248-9)

Indeed if we understand petitioners' argument correctly they do not question that interference with maritime contracts and the movements of a vessel are maritime torts (Petitioners' brief, p. 24). Rather, their argument is that the very maritime nature of this cause limits federal jurisdiction to jurisdiction in admiralty where, so they argue, injunctive relief is unobtainable. As the following discussion shows such a denial of federal jurisdiction to do justice in a maritime cause is inconsistent with *Romero*.

B. *This Court's Decision In Romero Is Susceptible Of Only Two Reasonable Interpretations And Under Either The District Court Had Jurisdiction Of This Suit.*

The answer to the questions of maritime jurisdiction under 28 U.S.C. Secs. 1331 and 1333 would seem to lie in the interpretation to be placed upon the following language, and particularly the italicized portion, from the Court's decision in *Romero*:

> "The provision of the Act of 1875 with which we are concerned was designed to give a new content of jurisdiction to the federal courts, not to reaffirm one long-established, smoothly functioning since 1789. We have uncovered no basis for finding the additional design of changing the method by which federal courts had administered admiralty law from the beginning. *The federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law.* There is not the slightest indication of any intention, or of any professional or lay demands for a change in the time-sanctioned mode of trying suits in admiralty without a jury, from which it can be inferred that by the new grant of jurisdiction of cases 'arising under the Constitution or laws' a drastic innovation was impliedly introduced in admiralty procedure, whereby Congress changed the method by which federal courts had administered admiralty law for almost a century." (358 U.S. at 368) (emphasis added)

There are three possible interpretations of the italicised sentence:

1. That the Court meant exactly what it said and that federal admiralty courts have all power necessary to the task of protecting maritime rights rooted in federal law, including equitable remedial powers.

2. That the Court was not thinking in terms of a case where equitable remedial powers were necessary to the task of protecting maritime rights rooted in federal law but intended only to comment on the adequacy of admiralty procedure in the type of case before it, where a remedy in damages was adequate and could be obtained in admiralty.

3. That the Court recognized that federal admiralty courts do not have equitable remedial powers but felt that such powers were unnecessary to the task of protecting maritime rights rooted in federal law.

The last of these interpretations is too unreasonable to merit serious consideration. The district court found that respondents were sustaining irreparable damage and would continue to sustain irreparable damage unless petitioners' activities were enjoined (Findings XVII, XIX, Tr. 35, 36). It also found that petitioners' conduct might cause irreparable damage to the relations of the United States with other friendly maritime nations (Finding XVIII, Tr. 35). These unchallenged findings clearly show that if respondents were entitled to relief, they were entitled to the equitable remedy of injunction granted by the court. And, while this and lower federal courts have frequently said that admiralty courts do not possess the remedial powers of equity, including injunction, they have never denied that there are maritime cases in which such relief is necessary to justice.

Each of the other possible constructions, however, deserves serious consideration on the basis not only of other language in the *Romero* decision but also of past

pronouncements of the Court. With each, however, jurisdiction of the district court in this case is consistent.

1. If Admiralty Courts May Issue Injunctions When Necessary To The Task Of Protecting Maritime Rights Rooted In Federal Law, Then The District Court Had Jurisdiction And Power To Enter The Decree In This Suit Under 28 U.S.C. Section 1333.

There can be no doubt that admiralty would have jurisdiction of this cause and that substantive maritime law would control if on these facts respondents requested only damages as a remedy. The case does not in some mysterious way cease to involve maritime rights rooted in federal law merely because equitable relief is requested. Regardless of whether a prayer for additional injunctive relief results in classification of the suit jurisdictionally as one "in equity" as two judges of the court below felt (265 F.2d at 783-785, Tr. 145-149) or not, the Court made clear in *Romero* that it remains substantively a case "of admiralty and maritime jurisdiction".

> "All suits involving maritime claims, regardless of the remedy sought, are cases of admiralty and maritime jurisdiction within the meaning of Article III whether they are asserted in the federal courts or, under the saving clause, in the state courts. Romero's claims for damages under the general maritime law are a case of admiralty and maritime jurisdiction. The substantive law on which these claims are based derives from the third provision of Art. III, Sec. 2, cl. 1. Without that constitutional grant Romero would have no federal claim to assert. Cf. 2 Story, Commentaries on the Constitution of the United States, Sec. 1672." (358 U.S. at 367, n. 23)

Admiralty treatises are, however, full of statements to the effect that admiralty courts do not possess the

remedial powers of equity and cannot issue injunctions, Gilmore and Black, The Law of Admiralty, at p. 37 (1957); 1 Benedict on Admiralty, at pp. 148-149 (6 ed. 1940). Indeed, these expressions find basis in the language of this Court:

> "While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity." (*The Eclipse*, 135 U.S. 599, at 608) (1890)
>
> "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions." (*Schoenamsgruber v. Hamburg-American Line*, 294 U.S. 454 at 457) (1935)

Closely examined, however, these statements appear to be mere dictum. Thus, in *The Eclipse*, supra, the relief sought was the winding up of a trust and the enforcement of a contract for the sale of a vessel and, as the Court noted, "There was nothing maritime about the claims" (135 U.S. at 608). Similarly, in *Schoenamsgruber*, supra, the question was whether the trial of a libel claiming damages for personal injury to a passenger on a vessel could be stayed pending arbitration required by the terms of the contract between the passenger and carrier. The Court held that it could. In doing so it noted that an order of stay was not an interlocutory injunction. Its language as to the availability of injunction in admiralty was wholly unnecessary to the decision in the case.

As this Court noted in *Swift and Company Packers*

v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950), these statements are no more than "a good deal of loose talk," 339 U.S. at 690; and the true principle is that a court of admiralty will not enforce an independent non-maritime claim merely because it pertains to maritime property, as was the case in *The Eclipse*, but will exercise equitable powers when necessary to justice in admiralty transactions or to the enforcement of maritime rights. In that case a libel had been brought in personam for non-delivery of cargo with a foreign attachment of a vessel other than the one in which shipment had been made. There was no claim in rem. The respondent asserted that it was not the owner of the vessel attached. The libelant alleged that respondent had fraudulently transferred the vessel and asked the court to set aside the transfer. The court granted that relief, holding:

> ". . . The issue of fraud arises in connection with the attachment as a means of effectuating a claim incontestably in admiralty. To deny an admiralty court jurisdiction over this subsidiary or derivative issue in a litigation clearly maritime would require an absolute rule that admiralty is rigorously excluded from all contact with non-maritime transactions and from all equitable relief, even though such equitable relief is sought, in the course of admiralty's exercise of its jurisdiction over a matter exclusively maritime. It would be strange indeed thus to hobble a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce. Controversies between admiralty and common law are familiar legal history. See Mr. Justice Story's classic opinion in De Lovio v. Boit, 7 Fed. Cas. 418, No. 3,776, 2 Gall. 398; 4

> Benedict on Admiralty cc. 61-63 (Knauth ed. 1940). We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article III of the Constitution." (339 U.S. 684 at 691-692)

In a case such as this, the ability to grant equitable relief should be even clearer. Here there is no subsidiary non-maritime transaction such as the transfer of the vessel in that case. The injunction is required to do justice in a case involving restrainable activities being conducted on navigable waters and interference with wholly maritime transactions.

That the language of the cases denying admiralty power to issue injunctions and grant other equitable relief in cases otherwise properly within admiralty jurisdiction is, as the Court described it, "loose talk" has been well documented in Morrison, The Remedial Powers of Admiralty, 43 Yale L. Rev. 1 (1933). The author shows that such denial is wholly inconsistent with the broad maritime jurisdiction of this country, with the recognition of equitable principles and defenses in the same courts which deny affirmative relief, and even with the once limited British admiralty jurisdiction; that it is based on no lack of Constitutional or statutory authority, and that the only possible explanation of it arises from the carry-over of a common law-equity dichotomy to which many of our judges were accus-

tomed and under which they mistakenly equated admiralty with common law powers. The author concluded,

> "If the separate admiralty jurisdiction has any value, it is absurd to force the litigant elsewhere merely because, upon the same subject-matter, justtice demands some remedy other than money damages in tort or for breach of contract." (Id. at 33)

This view is also shared by more recent commentators. See e.g. Gilmore and Black, The Law of Admiralty, at p. 37 (1957).

If the district court, as an admiralty court, had the power to grant the injunctive relief which it in fact gave, then concededly this case would fall within 28 U.S.C. Section 1333. *Romero* would be no obstacle to such jurisdiction, although it would then bar alternative maritime jurisdiction under Section 1331.

Petitioners may argue that such admiralty jurisdiction was not invoked; but the difference between captioning respondents' pleading a libel in personam and a complaint should certainly not require dismissal. Particularly so where that difference in nomenclature affecting no substantive or procedural right occurred in a pleading filed under the stress of irreparable injury, went unchallenged in the district court and was in accord with the weight of dicta if not holdings of the federal courts. In the converse situation this Court long ago ignored a misnomer of a common law action as in admiralty:

> "The substance and all the requisites of a common law proceeding are found in the record. Technical niceties are not required either in admiralty or revenue cases." (*Confiscation cases*, 87 U.S. 92, at 110) (1874)

The Supreme Court is clearly authorized to direct whatever may be necessary to continue or dispose of the suit "in admiralty," 28 U.S.C. 2106.

2. If The District Court's Admiralty Powers Were Inadequate To Protect Respondents' Maritime Rights The Romero Decision Would Not Operate To Deny Jurisdiction Of This Case Under 28 U.S.C. Section 1331, As "Arising Under The Constitution, Laws . . . Of The United States".

This Court has warned that,

> " . . . it would be beyond human achievement even of a long line of judges especially equipped for dealing with admiralty matters to have produced a wholly harmonious body of admiralty law or to have written opinions when concentrating on specific issues that should not have lent themselves through largeness or looseness of statement beyond the scope of their adjudication." (*Swift & Company Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 at 690) (1950)

It is possible, therefore that this Court in *Romero* did not intend what it said to apply to cases which its language would cover but which differed factually from that before it. Certainly the language surrounding the Court's statement that "admiralty courts had been completely adequate" shows that its attention was focused not on remedies but on "the method by which federal courts had administered admiralty law," i.e. on "the time-sanctioned mode of trying suits in admiralty without a jury."

If this be true, however, it is at once apparent, as the court of appeals held, that the reasoning of the *Romero* decision works to exclude, rather than include, this case from its ambit.

If the Court was concerned in *Romero* with preservation of trial without a jury in maritime causes, there is no need for concern here. Equity, of course, proceeds without a jury in exactly the same manner as admiralty and the court of appeals directed that such further proceedings as may occur in connection with the claim for damages be so heard (265 F.2d at 786, Tr. 150).

Again in *Romero* the Court expressed concern for preserving in the states their historical concurrent jurisdiction of admiralty causes where the common law is competent to provide a remedy. But it is one thing to save a concurrent state forum and quite a different thing to deny any federal forum and leave state courts as the only place for the vindication of important federal rights. If admiralty may not enjoin there is a plain distinction between *Romero* and this case in the lack of adequate alternative remedy here.

Petitioners seek to find a lack of admiralty remedy in *Romero* by urging that the jury trial there sought by plaintiff was a remedy not available in admiralty. In that they mistake a mode of proceeding to ascertain facts for a remedy. The remedy sought in *Romero* was obviously not a jury trial but a judgment in money damages.

Both the majority opinion and the dissenting opinions in *Romero* agree that the cause of action there was one at least in some sense arising under the Constitution of the United States. The minority felt that there was no sound reason for departing from the plain language of the Judiciary Act of 1875 in order to exclude it as a

case "arising under the Constitution, laws . . . of the United States" within the meaning of that statute, now 28 U.S.C. Section 1331. The majority found a reason in the "long established, smoothly functioning" admiralty jurisdiction providing an adequate federal forum for *Romero*. That reasoning should not apply to exclude any plaintiff entirely from a federal forum; and particularly from the forum provided by the plain language of a statute under which it has been said that the federal courts ". . . became the primary and powerful reliance for vindicating every right given by the Constitution, laws and treaties of the United States," Frankfurter and Landis, The Business of the Supreme Court, at 65 (1927).

Yet, here, petitioners seek that strange result in the type of cause for which the founding fathers deemed it most essential that there be a federal forum:

> "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." The Federalist No. 80.

C. *The District Court Also Had Jurisdiction Of This Claim By Aliens For A Maritime Tort In Violation Of Their Treaty Rights And Rights Under The Law Of Nations, Under 28 U.S.C. Sections 1331 and 1350.*

Independent bases for the jurisdiction of the district court exist under 28 U.S.C. Section 1331 and 1350, growing out of the tort claims based on violations of both treaty rights and rights under the law of nations. The

concern of the founding fathers for a federal forum to protect the rights of aliens just referred to was also expressed in the Judiciary Act of 1789. Section 9 of that Act, immediately following the provision of admiralty and maritime jurisdiction, gave the federal trial courts jurisdiction of any "civil action by an alien for tort only, committed in violation of the law of nations, or a treaty of the United States," 1 Stat. 77. Although general provision was made for jurisdiction of any civil action arising under the treaties of the United States in the Judiciary Act of 1875, there has been no repeal of the earlier statute and it remains as 28 U.S.C. Section 1350. The general provisions of the Act of 1875 introduced the amount in controversy requirement, which did not exist in the specific provision as to treaty claims of aliens in the Act of 1789 and does not now exist in Section 1350.

That the framers of the Constitution and the first Judiciary Act considered maritime law to be part of the law of nations has long been recognized in the decisions of the federal courts from the famous opinion of Mr. Justice Story in *De Lovio v. Boit*, Fed. Cas. No. 3776, to the recent elaboration by Mr. Justice Jackson in *Lauritzen v. Larsen*, 345 U.S. 571 (1952). The claim of respondents, as alien plaintiffs, for tort in violation of their maritime rights founded in the law of nations is therefore authorized under this section.

In addition, their rights to engage in commerce in the ports of the United States arise under the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Liberia, 54 Stat. 1739

(1939). That such treaties are more than a compact between nations and confer enforceable rights upon private individuals, and specifically the right to sue to restrain interference with the rights granted by the treaty, is shown by *Asakura v. Seattle,* 265 U.S. 332 (1924). In that case the Court held the Japanese plaintiff entitled to an injunction against the City of Seattle and its officers from enforcing against him an ordinance barring him, as an alien, from engaging in the business of pawn broker, a pursuit to which the Court found him entitled under a treaty between the United States and Japan.

As early as *Foster and Elam v. Neilson,* 27 U.S. (2 Pet.) 253 (1829), Chief Justice Marshall said,

> "Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." (27 U.S. at 314)

The fact that provisions of treaties of friendship, commerce and navigation are necessarily self-executing was emphasized in a dissenting opinion by Justice Field in *Baldwin v. Franks,* 120 U.S. 678 (1887). Although this question was not decisive of the issue then before the Court, Justice Field's persuasive analysis is nonetheless material. He noted:

> "These stipulations operate of their own force; that is, they require no legislative action for their enforcement." (120 U.S. 704)

He further analyzed such provisions as follows:

> "The right or privilege being conferred by the treaty, parties seeking to enjoy it take whatever steps are necessary to carry the provisions into ef-

> fect. Those who wish to engage in commerce enter our ports with their ships and cargoes; . . . no congressional legislation being required to provide that they shall enjoy the rights and privileges stipulated." (120 U.S. at 704)

In proclaiming the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Liberia on November 30, 1939, President Roosevelt did so,

> "to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America *and the citizens thereof*." (54 Stat. 1750, emphasis supplied)

It is thus clear that the Treaty both confers enforceable rights on respondents and imposes corresponding duties on petitioners. Their existence is recognized and a forum for their enforcement provided by both 28 U.S.C. Sections 1331 and 1350.

II. Petitioners' Conduct Was Not Absolutely Privileged By Either The Clayton Act Or The Norris-LaGuardia Act; Nor Was There A "Labor Dispute" Within The Meaning Of The Latter Act So As To Deprive The District Court of Jurisdiction To Issue An Injunction.

Petitioners' argument in attempting to establish the presence of a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C. Section 101ff., is truly amazing. At the outset they correctly state that ". . . respondents deny the existence of a labor dispute because petitioners picketed a foreign vessel employing a foreign crew" (Pet. Brief 10). They further acknowledge, ". . . nor do we understand respondents to argue that

foreign corporations per se are not subject to the restrictions of the Norris-LaGuardia Act" (Pet. Brief 11). Yet their entire argument is thereafter predicated on the proposition that respondents are trying to establish a special position for foreign shipowners. A dozen times between pages 16 and 24 of their brief they attack this "foreign shipowner," "foreign owner," "foreign plaintiff" and "foreign employer" who they have already admitted to be an irrelevant straw man.

Not once do they again advert to the facts of foreign registry, foreign articles and alien employees. There is no discussion of those canons of construction which have consistently led the courts to deny applicability of maritime and labor legislation to foreign vessels and foreign employment without explicit direction of Congress. Neither the language of the Act nor its legislative history is analyzed in the light of such canons.

The reasons for thus avoiding all relevant principles and authorities will become quickly apparent: None of them support their position.

A. *The Literally Universal Language Of American Labor Legislation Has Been Consistently Construed To Affect Only Employment Within The Territorial Limits Of The United States.*

In *Foley Bros. Inc. v. Filardo*, 336 U.S. 281 (1949), the court was faced with the question whether the Federal Eight Hour Law, 40 U.S.C. Sections 321-326, applied to work performed by an American citizen for an America employer, doing work on bases of the United States in Iran. This particular Act contained universal

language of "every laborer" and "any contractor or subcontractor" without limitation to the territorial United States or domestic labor.

In holding the Eight Hour Law was intended by Congress and should be applied by the courts only to situations within the territorial jurisdiction of the United States, the Supreme Court stated:

> "No distinction is drawn therein (in the Act) between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. *An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.*" (336 U.S. 281 at 286). (Emphasis supplied)

The Railway Labor Act has similarly been held inapplicable to employees of American airlines in foreign countries. In *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F. (2d) 685 (D.C. Cir., 1951), cert. den. 342 U.S. 849, a decision of the National Mediation Board that it had no jurisdiction over representation of airline dispatchers in foreign countries was affirmed. The court noted:

> "Explicitness is to be expected from Congress if its intention is to extend the legislation extraterritorially." (189 F. (2d) at 690-91)

Another example of this principle is the construction placed on the war-time Civilian Leave Act which granted "all civilian officers and employees" a pay leave. When plaintiff Filipinos sued, the court of claims held in *Luna v. United States,* 108 F. Supp. 510 (Ct. Cl. 1952), that though the words were literally universal, the Congressional intent could only be domestic coverage. The court made the astute observation:

> "We think that a decision that Section 30b was applicable to persons situated as was the plaintiff would be, in effect, snatching at an inadvertent lapse of attention on the part of Congress. . . . This case illustrates the inherent wisdom of the canon of construction to which we have referred above, that laws are presumed not to be applicable in foreign territory unless an intent that they should be so applicable is shown." (108 F. Supp. at 513)

Most significantly, the Labor Management Relations Act of 1947 (Taft Hartley Act), 29 U.S.C. Section 141ff, was similarly limited to domestic applicability when construed by this Court only three years ago in a case factually almost identical to this. In *Benz v. Compania Naviera Hidalgo, S. A.,* 353 U.S. 138 (1957), the court affirmed a judgment against American unions for the damages caused by their picketing of a Liberian flag vessel, owned by an alien corporate shipowner, while that vessel was temporarily present at a United States port on an international voyage. In that case, as this, an alien crew was employed aboard the vessel under articles opened abroad and subject to foreign law. There, as here, the American unions were picketing for the purpose of forcing a change in those articles and the reemployment

of the foreign crew on terms and conditions comparable to those on American flag vessels.

The question decided by this Court was whether the Labor Management Relations Act of 1947 applied to the controversy so as to pre-empt jurisdiction of the district court to award damages. The Court said,

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws." (353 U.S. at 143)

After reviewing the legislative history of the Act, the Court again commented,

> "What was said inescapably describes the boundaries of the Act as including only the working men of our own country and its possessions." (353 U.S. at 144)

That the court correctly interpreted the bounds of the Act is to be inferred from the fact that Congress, in passing the Labor-Management Reporting and Disclosure Act of 1959, continued to use the same definitions of "employer," "employee" and "labor dispute" in Section 3 of that Act as had formerly been in the National Labor Relations Act and Labor Management Relations Act, which it amends and supplements. See Public Law No. 86-257, 86 Cong., 1st Sess., Section 3 (Sept. 14, 1959) 1959 U. S. Code Cong. and Adm. News, at 2956-2957. Further support for the Court's refusal to apply general labor laws to foreign ships is found in the fact that in the sole instance in which Congress legislated on labor relations in the maritime industry it expressly limited the scope of the Act to United States

flag vessels, Title X of Merchant Marine Act 1936, 52 Stat. 965, 966 (1938) as amended by 55 Stat. 259 (1941). This Act was passed three years after the National Labor Relations Act of 1935 and as a "supplement" to it. See the statement of Mr. Justice Douglas, dissenting, in *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, at 499 (1947). American labor legislation, including the Norris-LaGuardia Act, written in universal terms for industries of all kinds, should be construed, when sought to be applied in the maritime industry, in conformity with the jurisdictional limits thus expressed by Congress in the only instance in which it legislated on the same subject for that particular industry.

B. *United States Laws Will Not Be Applied To Matters Affecting The Internal Economy Of A Foreign Flag Vessel Temporarily Within A United States Port Without Explicit Direction By Congress.*

Not only is there a canon of construction favoring territorial limitation to United States labor legislation; but there is also a canon of construction against the extension of our labor laws to foreign flag vessels.

In *Benz v. Compania Naviera Hidalgo, S.A.*, supra, this court reviewed a long series of Acts of Congress dealing with hiring and pay of seamen which the court at one time or another had been urged to apply to foreign vessels (353 U.S. at 144-146). It observed that such legislation had only been applied to effect the internal economies of foreign vessels upon the specific direction of Congress. In its discussion, the Court further noted that the National Labor Relations Board had

declined jurisdiction to select a collective bargaining agent for foreign seamen on a Panamanian vessel owned by a Panamanian corportion, "on the ground that the internal economy of vessel of foreign registry and ownership was involved," *Compania Maritima Samsoc Limitada*, Case. No. 20-RC-809, May 1, 1950, CCH NLRB Decisions, 1950-1951, Para. 10,081.

Two other recent decisions of this Court have emphasized the practical necessities which lie behind recognition of the law of the flag in matters pertaining to the internal economy of a vessel. In *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Court was urged to encompass foreign seamen injured aboard foreign flag vessels within the literal sweep of the universal "any seaman" of the Jones Act, 46 U.S.C. Section 688. In each case the Court held that the law of the flag must be looked to for the seaman's remedy. In *Lauritzen v. Larsen*, the Court stated,

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. . . .
>
> "This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ships, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' . . .

"Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the State that owns her." (345 U.S. at 584-585)

In *Romero*, the Court reiterated the principles:

"The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations." (358 U.S. at 383)

* * *

"To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." (358 U.S. at 384)

Here the existing contract of employment, the articles of the vessel, were opened at Cardiff, Wales under the law of Liberia and expressly incorporated terms and conditions of employment at or above those negotiated between Greek owners and Greek unions for employment on Greek flag vessels (Tr. 13, 14). The employees here were predominantly Greek and members of those Greek unions (Tr. 13, 69-70). Petitioners would force a change in that contract. But this was exactly the purpose of the picketing in the *Benz* case where the Court said,

"The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." (353 U.S. at 146)

C. *Neither The Language Nor The Purpose Of The Norris-LaGuardia Act Makes It Applicable To This Case.*

The Norris-LaGuardia Act contains no express statement that it is to be applicable to disputes involving employment aboard foreign ships or in foreign commerce generally.

Petitioners claim, nevertheless, that under the literal language of the Act there is a labor dispute here. They concede that there was no dispute between the foreign crew and the foreign shipowner (Pet. Brief 5). To support their contention, however, they cite *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) and *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91 (1940), each of which held that the Act's coverage protected activities of non-employees seeking to promote their supposed economic interests. These cases, however, involved purely domestic employment situations and are of no help whatever in finding a Congressional intent to apply the Act extra-territorially. The decision in *Benz* negates any possibility

of finding such intention in the definiton of labor dispute. The definition of labor dispute in the Labor Mangement Relations Act of 1947 is found in 29 U.S.C. Section 152(9):

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association of representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

The definition in the Norris-LaGuardia Act is found in 29 U.S.C. Section 113(c) and is identical, except that it includes only the phrase, "terms or conditions of employment" instead of the broader "terms, tenure or conditions of employment".

It would be strange indeed if Congress had used one such definition in the Norris-LaGuardia Act with intent to apply it to foreign shipping and had used substantially the same definition again in the Taft-Hartley Act without that intent. Particularly is this true in relation to two Acts which have the common purpose of promoting collective bargaining. Compare the statement of purpose in the Norris-LaGuardia Act, 29 U.S.C. 102, with the statement of purpose in the Taft-Hartley Act at 29 U.S.C. Section 151. As the court of appeals noted in denying applicability of the Norris-LaGuardia Act here,

> "If the Norris-LaGuardia Act was applicable here, the combination of such a holding and the holding in Benz that the Taft-Hartley administrative remedies are not available would result in there being no federal agency or court in which foreign com-

merce could seek protection. Such a result in the field of international commerce and relations should not be arrived at without more explicit direction from Congress." (265 F. 2d 780, Tr. 151)

The only two other cases which petitioners cite, supposedly in support of their argument, are *United States v. United Mine Workers*, 330 U.S. 258 (1947) and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). But the only point relevant to this case which we can derive from those decisions is that the Norris-LaGuardia Act will not be applied literally even in domestic situations but rather given limited application consistent with the fundamental purpose of the Act to promote collective bargaining.

In *United States v. United Mine Workers*, supra, the Court held the Norris-LaGuardia Act inapplicable to bar an injunction against the United Mine Workers in a dispute between it and the government, which had taken over operation of coal mines in this country and was acting in the commonly accepted status of an employer. Looking at the policy of the Act, rather than its literal language, the Court stated,

> "The purpose of the Act is said to be to contribute to the worker's 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . for the purpose of collective bargaining . . .' These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees." (330 U.S. at 274)

Again in the *Lincoln Mills* case, supra, the court expressly noted that,

> "A literal reading might bring the dispute within the terms of the Act." (353 U.S. at 458)

It nevertheless held that a federal court could enforce arbitration since such was not contrary to the policy of the Norris-LaGuardia Act where provided for by a labor agreement arrived at after collective bargaining. Certainly nothing in those cases indicates that Congress intended that the Act should be applied literally where the dispute involves foreign employment even though such is not done in cases of domestic employment.

Petitioners can point to no language of the Act nor to any case interpreting it which even hints that Congress intended its definition of labor dispute to apply to a case such as this. And they will find no comfort in the legislative history of the Act.

D. *The Legislative History Of The Norris-LaGuardia Act Inescapably Confines Its Reach To Disputes Involving Domestic Employment.*

A thorough search of the legislative history of the Norris-LaGuardia Act has revealed nothing which could be said in the slightest to show an intent to make the Act applicable to disputes over conditions of employment aboard a foreign flag vessel. Rather, the following excerpts indicate the contrary.

Congressman Dyer, speaking in favor of the bill, stated that it was:

> " * * * necessary for the Congress to declare for the United States a policy affecting American labor.". (75 Congressional Record, p. 5465)

And Congressman Blanton, speaking in opposition to the bill, said:

> "I believe earnestly in a proper American standard of wages, and an American standard of working conditions, and an American standard of working hours." (75 Congressional Record, p. 5482)

The testimony of witnesses before Congressional Committees makes even clearer the domestic contemplation of the Act. Walter G. Merritt, representing the League for Industrial Rights, testified as follows:

> " . . . it is proposed . . . .to dictate the conditions under which employers and employees shall live together in the industries throughout the United States." (Hearing on H. R. 5315 Before the House Committee on the Judiciary, 72d Cong. 1st Sess., ser. 3, at 48 (1932)

A spokesman for labor, Joseph Padway, General Counsel, Wisconsin State Federation of Labor, showed the domestic intent of the bill's sponsors:

> "Well, a labor dispute is a matter that can be taken into the State Courts very easily. It affects a situation that is generally within the confines of the State border. . . . I can not see why the disputes should not be settled right in the State courts of the State where the dispute arises, where the men, where the employees and the employers are, where the plant is located." (Hearing on S. 1482 Before A Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess. at 573) (1928)

Since the Court indicated in *United States v. Hutcheson*, 312 U.S. 219 (1940) that the Norris-LaGuardia Act was to be construed as an amendment of Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. Section

52, we have also examined the Congressional debates and committee proceedings in connection with that statute. Nothing whatever has been discovered which would shed the slightest light on the present problem or indicate that Congress in any way considered applying it so as to effect foreign employment.

E. *The Clayton Act Gives Petitioners' Conduct No Protection Independent Of The Norris-LaGuardia Act.*

Petitioners urge that, "if the Norris-LaGuardia Act applies", their conduct is privileged completely, and not merely against federal injunctive relief, by the Clayton Act (Pet. Br. 23). The reason for the qualifying phrase is obvious.

Section 20 of the Clayton Act, 29 U.S.C.A. Section 52, describes certain labor activities and concludes, "Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." That language was, however, promptly held to be applicable to the described activities, including picketing, only where they were engaged in by employees in a dispute with their own employer. *Duplex Printing Press Co. v. Deering*, 254 U.S. 433 (1921). It is admitted that there is no such dispute here (Pet. Br. 5). Even though the limits thus placed on the Clayton Act by judicial construction were removed by the implied amendment of the Norris-LaGuardia Act, as held in *U. S. v. Hutcheson*, supra, the conduct would still be protected only when participated in pursuant to the enlarged definition of labor dispute in the Norris-LaGuardia Act.

Thus, this argument is wholly dependent on establishing first that the term "labor dispute" in the Norris-LaGuardia Act was intended by Congress to apply to a dispute over terms and conditions of employment of aliens on a foreign flag vessel. That petitioners have not done.

Parenthetically, it may be noted, however, that this argument disproves another of petitioners' contentions. If the Norris-LaGuardia Act through implied amendment of the Clayton Act grants an absolute privilege to conduct, it is not just "regulating the District Courts, not litigants or their rights." (Pet. Br. 21). Like the Taft-Hartley Act, Norris-LaGuardia affects both substance and procedure where it applies.

F. *Petitioners' Attempted Distinctions Of The Benz Case Are Without Merit.*

Petitioners urge that in this case there are substantial American interests involved which were not involved in the *Benz* case and which should result in applicability of American labor legislation to the case. What are they?

Petitioners might first point to the fact that there was an American consignee of the cargo. But in nearly every case of a ship touching our ports there will be either an American consignee or shipper involved. The Court's opinion in the *Benz* case noted the findings in that case that the vessel had come to the United States port to load a cargo of wheat and complete certain repairs (353 U.S. at 139). That it did not consider these facts significant is shown by its statement that

> "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing." (353 U.S. at 142)

That quotation also shows the lack of significance of the "American contact" which the union sees in the employment of its members aboard vessels in the salt trade between Mexico and the United States. In *Benz*, the Court ignored an identical argument made by the unions that their economic interests in vessels engaged in the grain trade between United States and India were threatened by the wage scale aboard the Liberian vessel involved in that case. The statement of that point appears in the brief of the unions' counsel as summarized in 1 L. ed. 2d 2044, and was set forth in Mr. Justice Douglas' separate dissenting opinion, 353 U.S. 147.

Finally, petitioners argue that here the foreign corporate charterer of the vessel should be considered American because of American ownership of its stock. No such claim was made at the district court's hearings and petitioners did not object to the finding of the trial court that the charterer of the vessel was a foreign corporation (Finding II, R. 31). The court of appeals refused to consider this contention on rehearing because of failure to present it on the appeal; but noted in its opinion denying rehearing that,

> "In its statement of the case made by petitioner in its opening brief (page 3) reference to ownership and charter parties appear, from which no inference of American control can be logically drawn, indeed the inference is quite the opposite." (268 F.2d at 936, Tr. 154-155).

Assuming for the sake of argument, however, that the charterer were not foreign as the court found but American, it is hard to see any significance in this. The charterer of the vessel, Seatankers, Inc., was not the employer of the crew. Rather, the testimony of the master was that the master and crew were hired and paid by Panama Steamship Company, the Liberian corporate owner of the vessel (Tr. 70-71). There was also testimony that there was no connection whatever between National Bulk Carriers or its subsidiaries and Panama Steamship Company other than this sub-time charter of the Nikolos (Tr. 98).

The charter relationship is in essence no different from that which any passenger or shipper makes when he books space on a vessel. A time charter involves the booking of all of the space for a period of time. The passenger who books space for a thirty day cruise is doing the same thing on a smaller scale. If such, American contacts are to be the basis of application, then our labor laws would necessarily apply to nearly all foreign vessels touching our ports. Moreover, even if American investment interests did control the employment relationship, it would make no difference. In *Madison Shipping Corp. v. National Maritime Union*, E.D. Pa., Civil No. 27557 (1960, not yet reported), the controlling stock of the foreign corporate shipowner was admitted to be "at least 51 percent" owned by citizens of the United States. The shipowner sought an injunction against picketing by American unions and their international affiliates of the Liberian vessel, Madison Bell, at Philadelphia. The unions contended that Amer-

ican investment control should result in application of American labor law. District Judge Egan, nevertheless, granted a temporary restraining order on the ground that,

> ". . . on the present record the activities of the defendants appear to be an illegal interference with interstate and foreign commerce; that this dispute arises in the Port of Philadelphia on a foreign vessel, between a foreign employer and a foreign crew operating under articles of agreement made abroad under the laws of another nation; that the Norris-LaGuardia Act has no application in a dispute of this kind; and that this Court has jurisdiction of the parties and of the controversy." (Memorandum Opinion, January 16, 1950)

There can be little doubt of the correctness of his rejection of the contention, novel indeed from a union, that nationality of stockholders should outweigh not only the place of incorporation but also the place of hire, the nationality of the workers and the place of performance in determining law applicable to making a contract of employment and the standard of wages to be included in it. Surely the Shell Oil Company is not to bargain in Holland for its American employees working in the United States because of Dutch investment interests. Nor can the United Auto Workers picket General Motors in protest of the German standards of wages provided for in contracts made by its Opel subsidiary for German workers in German plants. Yet those are no different than the results petitioners seek here.

Petitioners cite one case in support of their theory, *Peninsular & Occidental Steamship Co.*, 120 N.L.R.B. 1097. There the Board took jurisdiction for a repre-

sentative election over two Liberian flag vessels. In its decision, the Board found on the basis of many factors not present in this case, including control by the named American shipowner, ". . . that the *Florida* and *Southern Cross* may not properly be considered for jurisdictional purposes as foreign vessels." (120 N.L.R.B. at 1101). In doing so it clearly violated Article XV of the Treaty of Friendship, Commerce and Navigation Between The United States and the Republic of Liberia, which requires that nationality of vessels be determined solely by registration:

"ARTICLE XV

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." (54 Stat. 1745)

In fairness to the Board it should be said that the Treaty apparently was not called to its attention.

The truth is that the nationality of neither the stockholders or the corporation they control is of any importance. In *Foley Bros. Inc. v. Filardo*, supra, and *Air Line Dispatchers Assn. v. National Mediation Board*, supra, American law was held inapplicable despite the fact that the employers were American corporations. And in the *Benz* case, this Court did not even consider the nationality of stockholders worth mentioning.

Contrary to petitioners' repeated (Pet. Br. 17, 23)

but unsupported statement, an American shipowner could obtain an injunction under the facts of this record if it stood in the place of respondents.

G. If Petitioners Wish To Enlarge The Expressly Limited Protection Congress Has Provided The American Merchant Marine They Should Address Themselves To It, Not The Courts.

Recognizing that nothing in the Norris-LaGuardia Act or its legislative history evinces a Congressional policy to apply it to a dispute involving employment aboard a foreign flag vessel temporarily in an American port, petitioners seek to find that missing Congressional intent in other legislation designed to protect the American merchant marine (Pet. Br. 16-17). Congressional action in that respect, however, clearly shows the opposite. Only the coastal trade is restricted to American vessels. There is no such restriction on international commerce. The very fact that it provides, at its expense as shipper, that 50% of government cargo be carried in American ships refutes the idea that a monopoly is intended even for such shipments. The fact that it subsidizes certain regular berth line operators in international commerce recognizes that foreign vessels have a competitive advantage in that field. It provides no subsidy for tramp or bulk cargo vessels.

Moreover, petitioner's argument ignores other factors which Congress must consider. Thus, the main emphasis of our foreign policy in the economic field has been to promote the development of the economies of our allies. It is common knowledge that among these

nations such as Great Britain, Japan, Norway and Greece depend to a considerable extent on the earnings of their shipping industry in foreign trade. Further it has been the policy of this country to encourage American investment abroad. And the Maritime Administration specifically encourages American ownership of Liberian, Panamanian an Honduran registered vessels. See Maritime Administration Policy Statement of November 5, 1956, 21 Fed. Reg. 8588 (1956), as amended, 21 Fed. Reg. 8920 (1956), 22 Fed. Reg. 4289 (1957), 22 Fed. Reg. 4448 (1957), 22 Fed. Reg. 7397 (1957), 23 Fed. Reg. 5956 (1958).

The importance of these American owned flags of convenience vessels has been stressed to Congress by the Department of Defense. In February, 1959, Vice Admiral Ralph E. Wilson, Deputy Chief of Naval Operations (Logistics) wrote to Senator Butler in part as follows:

> "More than half of the U. S. controlled tanker tonnage is registered under foreign flags.
>
> "Over the past few months, increasing pressure has been exerted against 'flags of convenience' by foreign shipping interests and maritime labor organizations . . . (which) threaten to make it economically impracticable for American owners to operate their ships under 'flags of convenience'. This raises the immediate question as to what steps should be taken to insure the continued availability of these ships for purposes of national defense." (105 Cong. Rec. 6014, Daily ed. Apr. 25, 1959).

To the same effect see also The Role of the U. S. Merchant Marine in National Security, Publication 748 National Academy of Sciences-National Research Council, at 55-60 (1959).

Finally petitioners' argument overlooks the probability of retaliative action by other nations which might impair even the commerce carried by the subsidized American Merchant Marine if this nation were to try to regulate the internal economies of foreign flag vessels.

If petitioners wish further protection for the American Merchant Marine than that which Congress has expressly provided they should address themselves to Congress; but, as the Court noted in *Lauritzen v. Larsen*, supra, not to the courts.

> "In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by amicus briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. . . . The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us." (345 U.S. at 593)

CONCLUSION

Respondents respectfully pray that the issuance of the temporary injunction by the district court, as affirmed by the judgment of the court of appeals, be affirmed and the cause remanded to the district court for such further proceedings as may be appropriate on the questions of permanent injunctive relief and damages.

Respectfully submitted,

JOHN D. MOSSER,
CHARLES B. HOWARD,
Counsel for Respondents.

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No. 403

In the Supreme Court of the United States

OCTOBER TERM, 1959

MARINE COOKS & STEWARDS, AFL, ETC., ET AL.,
PETITIONERS

v.

PANAMA STEAMSHIP COMPANY, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys,
Department of Justice, Washington 25, D.C.

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Petitioners, for the first time on petition for rehearing in the court below and again in their brief in this Court, have attempted to establish that there are American interests involved in the chartering of the vessel in this case, and from this factual assertion petitioners apparently seek to cast doubt on the nationality of the vessel. It should be noted initially, with regard to petitioners' statement of American interests, that this allegation is unsupported in the findings and conclusions of the district court, which, to the contrary, found that the owner, the time charterer, and the crew of the NIKOLOS were all foreign entities, that the crew had signed on under

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foreign shipping articles, and that the vessel was duly registered as a foreign merchant vessel under the laws of Liberia (R. 31–34). No finding was made of American ownership or participation in the chartering arrangements, nor did petitioners in any way object to the lack of such a finding. It was not until after full hearing and disposition of the case in the Court of Appeals, that, in a petition for rehearing, petitioners sought to raise the question of American control; the Court of Appeals deferred consideration of this issue and left it for hearing when and if a permanent injunction were sought (R. 154–155).

Greatly concerned by any possible failure to recognize that the NIKOLOS is a vessel of Liberia, properly registered under its laws, the Government of Liberia has requested the United States Department of State to bring certain matters to this Court's attention. In an Aide-Mémoire, transmitted to the Department of State under date of February 8, 1960, the Government of Liberia has made plain its conviction that under Article XV of its Treaty of Friendship, Commerce and Navigation[1] with this country, the flag and registry of a vessel, in this case those of Liberia, are determinative with regard to its nationality. Article XV provides:

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial

[1] The Treaty was signed on August 8, 1938, taking effect on November 21, 1939. T.S. No. 956, 54 Stat. 1739, 1745.

> waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

The Government of Liberia also wishes the Court to take notice of its requirements for registration of vessels, included as Appendix B, *infra*, pp. 9–26.

In forwarding this information to the Solicitor General for presentation to the Court, in its letter of February 17, 1960 (Appendix A, *infra*, pp. 6–8), the Department of State has clearly indicated its full support of the treaty interpretation held by the Liberian Government. In addition, the Department of State asserts that its view that nationality of a vessel follows flag and registry is "the basis for the United States' support of the position of Liberia in a proceeding pending before the International Court of Justice relating to the advisory opinion requested of that Court by the Assembly of the Inter-Governmental Maritime Consultative Organization on the Constitution of the Maritime Safety Committee" (Appendix A, *infra*, pp. 7–8).

Article XV of the treaty with Liberia, and comparable provisions, identifying a vessel's nationality with its flag and registry are common to many Treaties of Friendship, Commerce and Navigation between the United States and other nations,[2] and

[2] *E.g.*, Treaty with the Netherlands, signed on March 27, 1956 (Article XIX), 8 U.S.T. 2043, T.I.A.S. No. 3942; with Nicaragua, January 21, 1956 (Article XIX), 9 U.S.T. 449, T.I.A.S. No. 4024; with Iran, August 15, 1955 (Article X), 8 U.S.T. 899, T.I.A.S. No. 3853; with the Federal Republic of Germany, October 29, 1954 (Article XIX), 7 U.S.T. 1839, T.I.A.S. No. 3593; with Japan, April 2, 1953 (Article XIX), 4 U.S.T. 2063, T.I.A.S.

are consonant with principles of settled international law. According to this law, a vessel holds but one nationality which must be most easily ascertainable to provide the fullest measure of international public order. And because it is the sole means for such ascertainment, registration has been accepted as the test of nationality.[3]

In filing this memorandum, the United States takes no position on any of the other issues in this case, nor does it wish to suggest that the principle that the nationality of a vessel follows its flag and registry is dispositive of or controlling on the result of the case. It merely wishes to make clear to the Court, in view of petitioners' belated attempt to raise this particular

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No. 2863; with Israel, August 23, 1951 (Article XIX), 5 U.S.T. 550, T.I.A.S. No. 2948; with Greece, August 3, 1951 (Article XXI), 5 U.S.T. 1829, T.I.A.S. No. 3057; with Ireland, January 21, 1950 (Article XVIII), 1 U.S.T. 785, T.I.A.S. No. 2155; with Italy, February 2, 1948 (Article XIX), 63 Stat. 2255, T.I.A.S. No. 1965; with China, November 4, 1946 (Article XXI), 63 Stat. 1299, T.I.A.S. No. 1871; with Finland, February 13, 1934 (Article XV), 49 Stat. 2659, T.S. No. 868; with Norway, June 5, 1928 (Article X), 47 Stat. 2135, T.S. No. 852; with Honduras, December 7, 1927 (Article X), 45 Stat. 2618, T.S. No. 764.

[3] Rienow, *The Test of the Nationality of a Merchant Vessel* (1937), 218; Colombos, *The International Law of the Sea* (3d rev. ed., 1954), 216–217; Briggs, *The Law of Nations* (2d ed., 1952), 331; Comment, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing*, 69 Yale Law Journal 498, 510 (January, 1960).

question, the position on this issue taken by the United States and Liberia.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys.

FEBRUARY 1960.

APPENDIX A

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

FEBRUARY 17, 1960.

The Hon. J. LEE RANKIN,
Solicitor General, Department of Justice.

DEAR MR. SOLICITOR GENERAL: By Aide-Mémoire dated February 8, 1960, the Embassy of Liberia sought the assistance of this Department in bringing certain matters to the attention of the Supreme Court of the United States in connection with the case of *Marine Cooks & Stewards* v. *Panama SS Co.* (Docket Number 403), now awaiting argument in the Court.

The specific problem with which the Embassy of Liberia is concerned is this. In earlier phases of the litigation the lower courts gave recognition to the flag and registry of the vessel involved, the NIKOLOS, treating her as a Liberian vessel. The Court of Appeals for the Ninth Circuit described the NIKOLOS as a "* * * vessel lawfully registered with a friendly nation manned by an alien crew under foreign shipping articles." As stated in the Aide-Mémoire, the Embassy of Liberia is now informed and believes that the right of recognition and status of Liberian registry will be put in issue by the petitioners. The Embassy may have reference to the discussion contained on pages 4 and 5 of the Brief for Petitioners, and Appendix B thereto.

After noting the recognition of the status of the NIKOLOS by the lower courts and the possibility that

this question of status may now be put at issue in the Supreme Court, the Embassy of Liberia feels it essential that the Supreme Court have before it the controlling provision of the Treaty between the Republic of Liberia and the United States of America, signed on August 8, 1938, 54 Stat. 1739. This provision, in Liberia's view, is Article XV, which provides:

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is shown.

Additionally, the Embassy of Liberia desires that the Supreme Court have before it the requirements for ship registration under the Liberian flag, contained in the enclosed official document of the Government of Liberia entitled "The Liberian Maritime Programme". The Embassy has therefore requested that the Department of State request that Article XV and the contents of the enclosed document be brought to the attention of the Court.

This Department is of the opinion that, both as required by Article XV of the above-mentioned Treaty between the Republic of Liberia and the United States and as a rule of international law, a vessel flying the Liberian flag and carrying the papers required by Liberian law, such as the NIKOLOS, must be recognized by the United States as a Liberian vessel both within the territorial waters of the United States and on the high seas. This rule that ships have the nationality of the State whose flag they are entitled to fly forms the basis for the United States' support of the position of Liberia in a proceeding pending before the International Court

of Justice relating to the advisory opinion requested of that Court by the Assembly of the Inter-Governmental Maritime Consultative Organization on the Constitution of the Maritime Safety Committee.

Accordingly, it is respectfully requested that you bring Article XV of the above-mentioned Treaty and "The Liberian Maritime Programme" and the above views of this Department to the attention of the Supreme Court in connection with its consideration of the case of *Marine Cooks & Stewards* v. *Panama SS Co.*

Very truly yours,

/s/ Eric H. Hager,
The Legal Adviser.

Enclosure:
1. "The Liberian Maritime Programme".

APPENDIX B

THE LIBERIAN MARITIME PROGRAMME

The Maritime Programme, as established by the Liberian Maritime Laws and Regulations and as further implemented by the administrative policies of the offices of the Commissioner and Deputy Commissioners of Maritime Affairs, provides for a system whereby Liberian Flag vessels must meet and constantly maintain the highest standards possible. These standards, prescribed by the Liberian Maritime Laws and Regulations and the International Conventions ratified by Liberia, must not only be met for purposes of registration but also for the continuing maintenance of registration of vessels under the Liberian Flag.

(A) *Liberian Registration Requirements*

Registration requirements are set forth in Sections 56 and 66 of the Liberian Maritime Law, as amended (formerly the Liberian Maritime Code), hereinafter referred to as "the Maritime Law". In essence, these Sections require the submission to the Commissioner or a Deputy Commissioner, by the applicant for registration, of satisfactory proof as to (1) ownership of the vessel; (2) proof of seaworthiness; (3) in the case of transfer from a foreign flag, consent of the government concerned and cancellation from the foreign registry; (4) payment of proper fees and taxes.

(1) *Ownership*

Every effort is made to encourage the ownership of vessels by Liberian citizens (corporations, part-

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nerships or in individuals). Official policy is to require Liberian ownership of vessels under 1600 net tons. As at October 31, 1959, out of a total of 360 vessels of 4,517,871 gross tons registered since 1957, 186 vessels of 2,507,447 gross tons were owned by Liberian nationals.

(2) *Proof of Seaworthiness*

Recognizing that classification with a reputable Classification Society has long been accepted as the most satisfactory proof of seaworthiness by maritime nations, insurance companies and underwriters, shipowners, purchasers and sellers of vessels and others directly interested in maritime matters, the Republic of Liberia in Regulations 2.2 and 2.7 of the Maritime Law accepts classification as evidence that a vessel is in seaworthy condition. Five of the leading Classification Societies have been designated as the only Societies with whom classification will be accepted. These Classification Societies are:

American Bureau of Shipping
Bureau Veritas
Det Norske Veritas
Germanischer Lloyd
Lloyd's Register of Shipping.

Classification is not only a prerequisite for registration, but failure to maintain class, once registered, makes the vessel liable to loss of registration. This statutory requirement of seaworthiness goes beyond the requirements of many other maritime nations.

(3) *Transfer from foreign flag*

Where a vessel is being transferred from a foreign registry, the required proof of permission and cancellation that is submitted must expressly affirm that the vessel is to be registered under Liberian Flag in the name of the applicant. This is, of course, consistent with accepted international principles that

a vessel may not have at any time more than one registry. It is also acknowledgment by the government of the former registry of the effective transfer of the registry.

(4) *Other factors affecting registration*

Mere compliance with the basic requirements of the above Sections of the Maritime Law and Regulations does not mean automatic acceptance for registration. Factors such as ownership, age, type or size of the vessel, or proposed trade may operate to make the vessel undersirable and, as a result, the application will be refused. Liberia has one of the most modern fleets with respect to age, size and type of vessel, and every effort is made to see that this is continued. Applications involving older vessels are usually refused. Thus, of the 4,517,871 gross tons registered under Liberian Flag from July 1, 1957, to October 31, 1959, only 4% (approximately) were built prior to 1942. Moreover, approximately 74.8% of this total registration, or 3,380,675 gross tons, are less than three years of age.

(B) *Compliance with International Conventions*

In addition to the prerequisite of classification denoting seaworthiness, all Liberian vessels are required to comply fully with all the applicable requirements of the International Conventions to which the Republic of Liberia is or may become a signatory. Among the International Conventions which Liberia has ratified and incorporated into its laws, are the following:

International Convention for the Safety of Life at Sea, 1948

International Load Line Convention, 1930

International Telecommunication Convention, 1947.

Regulation 2.8 provides that, if a vessel fails to comply with the applicable requirements of these International Conventions, the Commissioner or a Deputy Commissioner of Maritime Affairs may cancel the vessel's Certificate of Registry or impose such other conditions as may be required.

The Republic of Liberia issues a number of Certificates required by the above-mentioned International Conventions. These documents include:

(1) *Liberian International Load Line Certificate.* This Certificate is issued in the form and manner prescribed by the International Load Line Convention, 1930. The Classification Societies, mentioned previously, acting on behalf of the Republic of Liberia, assign load line and freeboards in accordance with the Rules established in the Convention. Inasmuch as the Convention makes the assignment of load line conditional upon the ship being structurally efficient and effective protection being provided for ship and crew, such assignment is made only after extensive surveys. The Load Line Certificate is valid for a term not exceeding five years. Renewal of a Liberian Load Line Certificate by the issuance of a new Certificate may be effected only after a survey no less complete than the initial survey.

Inasmuch as full responsibility for Certificates issued under the Convention rests with the Government on whose behalf such Certificates are issued, the Republic of Liberia also requires annual load line inspections to ensure that the hull and superstructures have not been altered and that the fittings and appliances specified in the Convention are maintained as required throughout the term of the Load Line Certificate. Copies of Liberian Load Line Certificates and Annual Load Line Inspection Reports are filed with the offices of the Commissioner and the Deputy

Commissioners. The Deputy Commissioner's office reviews such Certificates and Reports and keeps a record of the dates of expiration of the Load Line Certificates in order to keep control over the owners' compliance with the requirements concerning surveys to be carried out and Certificates to be issued or renewed.

(2) *Liberian Safety Equipment Certificate.* This Certificate is required by the International Convention for the Safety of Life at Sea, 1948. The Certificate is issued by the proper Classification Society when the necessary surveys set forth in the Convention, with respect to structural efficiency, life-saving equipment and other matters, have been completed. The Certificate is issued in the form and manner prescribed by the Convention and is valid for a term not exceeding two years. Renewal of a Liberian Safety Equipment Certificate may be effected only after a survey no less complete than the initial survey. Where the Convention requires types of approved equipment, generally accepted international standards must be satisfied. Exemptions from any requirements of the Convention with respect to this particular Certificate or any other Certificates mentioned herein may not be granted by the Societies unless specifically approved by the Commissioner or a Deputy Commissioner. Any such exemptions are kept at a minimum and are granted only where warranted within the scope and intent of the Convention. Copies of the Liberian Safety Equipment Certificates are filed with the office of the Commissioner and the Deputy Commissioners, which reviews such Certificates and keeps a record of the dates of expiration to see all requirements are constantly met. This Certificate is also checked against the other registration documents to see that there is no variation between them. For example, if the Cer-

tificate shows life-saving equipment for a lesser number of personnel than indicated in the application for registration, immediate steps are taken to ascertain the correct facts.

(3) *Liberian Safety Radiotelegraphy or -telephony Certificate.* This Certificate is also issued by the proper Classification Society in accordance with the rules established by the International Convention for the Safety of Life at Sea, 1948. It is issued in the form and manner prescribed by the Convention and valid for a term not exceeding one year. It is issued only after an extensive survey of the radio, telegraphy and/or telephony equipment on board the vessel. Renewal of the Liberian Safety Radiotelegraphy or -telephony Certificates may be effected only after a survey no less complete than the initial survey. This Certificate, and all the other Certificates referred to herein, are reviewed by the Deputy Commissioner's office, and schedules of the dates of expiration are kept in order to keep control over the requirements and to see that the necessary surveys are carried out and the Certificates issued or renewed.

(4) *Liberian Safety Certificate.* This Certificate is also issued pursuant to the rules and requirements set forth in the International Convention for the Safety of Life at Sea, 1948. This Certificate is issued only with respect to passenger ships, and is issued in lieu of the Safety Equipment and Safety Radiotelegraphy Certificates. The same review and schedules are kept in connection with this Certificate as mentioned above in connection with other Certificates.

(5) *Liberian Certificate of Measurement.* All Liberian Flag vessels are required to have a Liberian Certificate of Measurement. Regulation 2.3 adopts, as a standard of measurement for vessels under Liberian Flag, Title 19, Part 2, of the Code of Federal

Regulations of the United States of America. In this connection, all Classification Societies acting for and on behalf of the Republic of Liberia have been instructed with respect to this requirement. Any time a change is made with respect to the vessel affecting its measurement, such change must be communicated immediately both to the Classification Society and to the Office of the Deputy Commissioner of Maritime Affairs in New York.

The vessel's structure and equipment thus must meet the requirements set forth in the above-mentioned International Conventions. New-buildings to be registered under Liberian Flag are in accordance with the International Conventions surveyed during construction by Classification Societies acting on behalf of the Republic of Liberia, and the required Classification Certificates are issued upon completion of construction of the vessels. Vessels being transferred from the registry of a nation that is a signatory to both the International Load Line Convention and the Convention for the Safety of Life at Sea, 1948, have already met all the applicable requirements of the Conventions and are therefore in possession of all the required Certificates issued pursuant to those Conventions. Although these vessels are eligible at the time of registration for the corresponding Liberian Certificates, because of the nature of the shipping industry it is not always physically possible to have the then current Certificates available to the Commissioner or Deputy Commissioner; accordingly, subject to compliance with other requirements, the vessels are issued Provisional Certificates of Registry. The Permanent Certificate of Registry is issued after the necessary Liberian Certificates have been prepared and issued. However, the issuance of a Provisional Certificate of Registry does not mean that a vessel is

being registered conditionally or provisionally, with any requirements either waived or disregarded. If, however, the vessel is being transferred from a nation that is not a signatory to these Conventions, the vessel will not be registered until it has first been surveyed by the proper Classification Society and all Liberian Certificates issued in accordance with the International Conventions.

In the issuance of the various Certificates required by the International Conventions mentioned above, the Republic of Liberia has appointed and authorized the five Classification Societies mentioned above to conduct, on its behalf, all the necessary surveys enumerated by the International Conventions and, if the vessels are found to comply fully with the requirements set forth therein, to issue for and on behalf of the Republic of Liberia the necessary Liberian Certificates. The use of these Classification Societies has enabled the Republic of Liberia to have available for its immediate use worldwide organizations of technical experts whose knowledge, ability and integrity are beyond reproach. This is in clear contrast with the position in a number of the so called traditional maritime nations, where the departments or branches of government concerned with such inspections and surveys are restricted to the territorial limits of that particular country or its possessions.

(C) *Additional Standards*

In many cases, Liberian Flag vessels are required to meet standards above and beyond those called for by these International Conventions. For example the International Load Line Convention provides for the issuance of a Load Line Certificate valid for five years and, further, calls for "periodic inspections". Although some signatories to the Convention have interpreted "periodic inspections" as referring to periods

far in excess of one year, all Liberian Flag vessels must have such inspections conducted on an annual basis. Another example is Regulation 51 of the International Convention for the Safety of Life at Sea, 1948, which requires an alternate means of firefighting equipment for new vessels. Liberia makes this a requirement not only for new vessels, but also for existing vessels. With respect to radio, although the International Convention for the Safety of Life at Sea, 1948, permits any Authority, in respect of vessels over 1600 net tons but less than 5500 gross tons, to allow less than eight hours of listening time by operators, the Republic of Liberia always requires that all such vessels under its Flag must at all times provide at least eight hours of listening time by an operator.

(D) *Further Controls*

(1) *Ship Radio Station License.*

Another document to be submitted for registration is the Application for Ship Radio Station License. This license application is carefully scrutinized and the equipment and items appearing thereon are thoroughly checked against the list of modern and up-to-date equipment maintained on file in the Office of the Deputy Commissioner in New York. Where appropriate, the items on the application are also checked against the date as shown on the Liberian Safety Radiotelegraphy Certificate. The Ship Radio Station License is valid for three years and, upon expiration, a new license is issued only upon the submission of a new application. The purpose of requiring a new application is to provide a system whereby a check is maintained so as to see that the radio equipment is being maintained properly.

When the application for registration has been thoroughly checked and approved, the vessel is assigned an Official Number and Radio Call Letters.

These Radio Call Letters are in the first instance allocated to the various countries by the International Telecommunication Union located in Geneva. Blocks of letters are assigned and reserved for the various countries. Originally, Liberia had been assigned the ELAA through ELZZ and 5LAA through 5LZZ blocks. Because of the large registration under Liberian Flag, these blocks have been almost exhausted and, at the request of Liberia, the ITU has issued 5MAA through 5MZZ.

(2) *Licenses and Examinations.*

Liberia's comprehensive system of licensing deck, engineering and radio officers has been acclaimed throughout the shipping industry as one of the finest. Examinations may be taken at any one of the numerous examination centres conveniently located throughout the world. Also, Radar Observers Certificates are issued to qualified masters and deck officers holding Liberian Officers' Licenses of Competence upon successful completion of a comprehensive written examination. Examinations for the certification of efficient lifeboatmen have been provided. All form a part of Liberia's determined programme to enforce the higher standards of safety and competency aboard ships flying the Liberian Flag. In an article on September 28, 1958, the "New York Times", commenting on the Liberian licensing system, reported, "Independent operators and marine insurance underwriters agreed last week that the tests equal the toughest and best controlled examinations given by any of the traditional maritime nations".

(a) *Licenses of Competence.*

Section 290, Chapter 10, of the Liberian Maritime Law requires all officers on board Liberian Flag vessels to have Liberian Licenses of Competence to fill the respective positions in which they are serving.

This is a requirement which must be met, and neither the Commissioner nor a Deputy Commissioner will issue any waiver in connection therewith. Firm control over the issuance of officers' licenses is established and maintained by permitting such licenses to be issued only by the Commissioner or a Deputy Commissioner.

Regulation 1.5 provides that a Liberian license may be issued either (1) on the basis of a license issued by another recognized maritime nation or (2) upon the successful completion of a comprehensive written examination.

(*i*) *License without examination*

When issued on the basis of a license of another recognized maritime nation, such nation itself must have required for the issuance of its own license the passing of a comprehensive written examination, coupled with substantial medical, physical, moral and practical sea experience requirements. The applicant for the Liberian license must file a comprehensive application on a required form together with a thorough medical report on the stationery of a recognized physician, two letters of recommendation, one from a company who had employed him in the past and one from a senior officer under whom he had served aboard the vessel, three photographs of himself, two photostats of his non-Liberian license and a nominal fee. The non-Liberian license must be still valid and outstanding and, in addition, the applicant must prove that he has been to sea in that capacity within the past five years. The application, together with the accompanying documents and papers, is carefully scrutinized and investigated and, if found to meet the necessary requirements, the proper Liberian License of Competence is issued. This license will be in the same grade only as the non-Liberian

license submitted. If the non-Liberian license had noted on it any restrictions, such as limitations as to tonnage, horsepower or trading area, the same restrictions will be stated in the Liberian license.

(ii) License by examination

Where the applicant is seeking a Liberian license on the basis of the comprehensive Liberian written examination he must first satisfy requirements with respect to experience, medical, physical and moral standards. The Liberian system of examinations was devised as the result of many meetings and discussions with a committee of shipowners, operators, officers and other parties experienced in maritime matters. These meetings were called by the Deputy Commissioner in New York expressly for this purpose, and the examinations which were finally set up are most comprehensive, covering every subject that the officer should and must know, be he serving in the deck, engine or radio department. With respect to deck officers, the subjects covered include:

Navigation
International Rules of the Road
Cargo Handling and Stowage
Instruments and Accessories
Seamanship
Chart Navigation
Sea Terms and Definitions
Ocean winds, weather & currents
Rules and Regulations
Firefighting
Lifesaving
Radar Navigation
Signalling
Star Identification
Aids to Navigation

In connection with engine officers, the subjects covered include:

Marine Boilers
Turbines
Electricity
Refrigeration
Diesel Engines
Engineering Mathematics
Rules and Regulations
Firefighting

With respect to radio operators, the subjects covered include:

International Regulations
Taxation of Telegrams
"Q" Code
Frequency Allocations
International Publications
Basic Operator Procedure
Radar
Basic Electricity
Radio Tubes
Transmitting and Receiving Telegraphy and Telephony
Radio direction finders
Practical Operation of equipment, including starting, stopping, tuning, transmission and receiving

(b) *Examination Procedure:*

The examination itself takes from three to five days, depending upon the applicant's ability. A set formula has been established in so far as the requirements of previous experience are concerned. Thus, in order to take the Master's examination, the applicant must be a holder of a first mate's license issued by Liberia or another recognized maritime nation and must while the holder of such license,

have served either one year as a first mate or two years as a second mate.

In view of the short time spent in any port, especially in the case of tankers, it would be most difficult for some applicants to spend three to five days in port for examination purposes. For this reason, in addition to facilities for examination set up throughout the world, part of the examination (except in the case of Masters and Chief Engineers) can be taken on board a vessel.

The Republic of Liberia fully realizes the importance of proper controls and safeguards over the examination. To this end special procedures have been devised for examinations on board ship with instructions to Masters, under whose directions or in whose presence the examinations are conducted and who return affidavits as to freedom from assistance and time taken. Moreover, in such situations a second, shorter, but nevertheless comprehensive, examination must be taken at one of the designated port facilities.

Besides being avaialable on Monrovia and New York, facilities for the deck and engineering examinations as provided by three of the Classification Societies who are acting as agents for the Republic of Liberia in connection with the issuance of the Liberian Certificates required by the International Conventions. These Classification Societies are:

American Bureau of Shipping
Bureau Veritas
Lloyd's Register of Shipping

The radio examination which, in every case, must be taken at a shore facility, is given at facilities provided by Société Anonyme Internationale de Télégraphie Sans Fil (S.A.I.T.) and its affiliates.

All the examinations are prepared in the office of the Deputy Commissioner of Maritime Affairs in New

York and returned to this same office upon completion. When returned, they are turned over to a Board of Examiners for grading and recommendations. Acting upon these recommendations, the Deputy Commissioner then proceeds to issue the license, if warranted.

Because of the control exercised over the examination, the type of examination itself, the subject-matter covered, and the accompanying experience, medical, physical and moral requirements, shipowners, operators, insurance company adjusters, shipping men in general and officers have a high regard for the Liberian licenses.

(3) *Radar Observer Certificates.*

Radar Observer Certificates are issued only to qualified masters and deck officers holding Liberian Officers' Licenses of Competence. These Certificates are issued only upon the successful completion of comprehensive examinations which embrace basic radar theory, operation, use, interpretation and plotting.

(4) *Certification of Lifeboatmen.*

The Republic of Liberia requires that all passenger ships flying its Flag have the proper number of certified lifeboatmen in accordance with the International Convention for the Safety of Life at Sea, 1948. The seamen are examined both orally and by a written examination and also put through practical tests with respect to lowering, raising and manning lifeboats and with respect to lifesaving equipment. These lifeboatmen certificates may be issued only by the Commissioner or the Deputy Commissioner. When the examination is completed, the examiner submits his reports and recommendations to the Deputy Commissioner, who then takes appropriate action.

(5) *Casualty Reports.*

Regulation 1.8 provides that, in the event of any casualty on board a Liberian vessel involving loss of life or loss or damage to property, estimated to be in excess of $50,000, the Master shall promptly forward a report thereon, signed by him, to the Commissioner of Maritime Affairs and to the Deputy Commissioner of Maritime Affairs at New York. Such report shall set forth the name and Official Number of the vessel, the type of the vessel, the name and address of the owner, the date and time of the casualty, the exact locality of the casualty, the nature of the casualty, and the circumstances under which it took place. If the casualty involves collision with another vessel, the name of such other vessel shall be provided. Where the casualty involves a loss of life, the names of all persons whose lives are lost shall be provided, and where damage to property is involved, the nature of the property damaged and the then estimate of the extent of the damage shall be supplied. This requirement goes beyond what is required by a number of other maritime nations.

(6) *Officer's Questionnaire.*

The Master of every vessel must complete a Questionnaire with respect to the officers serving on board the vessel, giving in detail the individual's name, the position held, the Liberian and non-Liberian license he has and also data with respect to the watches maintained. This report must be submitted on an annual basis.

(7) *Documents furnished Master.*

Upon registration of a vessel under Liberian Flag, the Master is handed a letter with enclosures. These enclosures include:

1. The Liberian Maritime Law (Form RLM–107)
2. Liberian Regulations (Form RLM–108)

3. Pamphlet entitled "Regulations for Preventing Collisions at Sea" (Form RLM–111)
4. Blank Reports of Maritime Casualty or Accident (Form RLM–109)
5. Notice to Navigators
6. Four copies of Oath of Master (Form RLM–113)
7. Officer's Questionnaire

(8) *Ship's Files.*

Once registered, up-to-date files on every Liberian vessel are kept in the Office of the Commissioner in Monrovia and also in the Office of the Deputy Commissioner in New York. All documents, correspondence and Certificates relating to the particular vessel are kept in these individual ship files. In addition, current schedules are maintained as to all Certificates outstanding as to any particular vessel in order that the owner or agent of such vessel be informed sufficiently in advance with respect to the pending expiration of any Certificate and the need for renewing a Certificate. Any unreasonable delay in the carrying out of the surveys required for the renewal of the Certificates could result in the striking of the vessel from Liberian registry.

(E) *Participation in International Maritime Affairs*

Liberia has by no means neglected its responsibilities and duties in the community of nations. For example, in April 1958 Liberia joined the North Atlantic Ice Patrol and agreed to share the cost of operation and maintenance of this service, based on its percentage of the total tonnage navigating the waters concerned, in the same manner and on the same basis in which fourteen other countries belonging to the Patrol share the expense. As a result, Liberia's assessment for the 1958 season was the second highest of all countries (a fraction less than the highest, the

United Kingdom). The North Atlantic Ice Patrol was set up by leading maritime Nations after the "Titanic" disaster to provide protection from the danger of icebergs to shipping on the North Atlantic route between Europe and the United States.

Liberian delegates have attended and actively participated in such international conferences as the Law of the Sea Conference held in Geneva in 1958, the Maritime Session of the Convention of the I.L.O. in 1958, and the Intergovernmental Maritime Consultative Organization's first meeting in London in January 1959.

Liberia was also invited to be a member of the Sub-Committee on Tonnage and Measurements of the I.M.CO. Maritime Safety Committee. The Government of Liberia accepted this invitation, subject to reservation of its position in relation to the validity of the election to the Maritime Safety Committee held on January 15, 1959; and it has since actively participated in the work of the Sub-Committee. Liberia will be participating in the Safety of Life at Sea discussions schedules for 1960 and in the Load Line discussions originally scheduled for the same time but now being deferred at the request of the United Kingdom Government.

Liberia is also a member of the United Nations and is an active participant in many branches of the United Nations and the technical organizations which are affiliated with the United Nations. In addition, Liberia has throughout the years concluded a number of treaties of friendship, commerce and navigation with other countries, including the United States, the United Kingdom, Spain, France, Belgium, West Germany and Ethiopia.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,
Petitioners,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply Brief

JOHN PAUL JENNINGS
Mills Tower, 220 Bush Street
San Francisco 4, California

J. DUANE VANCE
230 Sixth Avenue, North
Seattle 9, Washington

Counsel for Petitioners

PARKER PRINTING COMPANY, 100 FIRST STREET, SAN FRANCISCO 5

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Petitioners' Reply Brief

Respondents argue that petitioners' picketing somehow interfered with the internal economy of the *S.S. Nikolos*, a vessel of foreign registry and that the Norris-LaGuardia Act therefore does not apply. Petitioners urge that the dispute is not one internal to the economy of the ship, but is a dispute which in no way involves relations between the crew and their employers and a Norris-LaGuardia labor dispute is established.

In this reply brief, petitioners will argue first that the dispute between respondents and the petitioner labor union involves a clash of economic interests very like those in-

volved in other cases before this court in which the Norris-LaGuardia Act was held applicable and that no interference with the internal economy of the *S.S. Nikolos* is involved.

The respondents' argument as to the Norris-LaGuardia Act's application therefore must fail as it is based on a false premise that the dispute concerns the internal economy of a foreign ship.

Even though the Norris-LaGuardia Act were not applicable, nevertheless, the district court lacked jurisdiction to grant an injunction for petitioners' alleged maritime tort in peacefully picketing the *S.S. Nikolos*. We have pointed out in our opening brief (pages 24-27) that the decision of this court in *Romero v. International Terminal Operating Company* 358 U.S. 354 precludes assertion of federal question jurisdiction under 28 U.S.C. Sec. 1331. Respondents now assert two new theories of jurisdiction, neither of which is legally sound.

Respondents ask this court to reverse the long-established rule that suit for an injunction is not within the admiralty jurisdiction in order to permit an injunction in a labor dispute. The case cited by respondents to support this argument in fact warrants a contrary conclusion.

Finally we will argue that petitioners by peacefully picketing committed no tort in violation of the treaty with Liberia and jurisdiction therefore may not be predicated on 28 U.S.C. Sec. 1350.

THE PRESENT DISPUTE IS A LABOR DISPUTE WITHIN THE MEANING OF THE NORRIS-LaGUARDIA ACT AND DOES NOT INVOLVE THE INTERNAL ECONOMY OF A FOREIGN VESSEL.

If the Norris-LaGuardia Act is applicable an injunction is prohibited and there is no need to consider respondents' argument that an admiralty court may entertain an equi-

table suit for injunction. Petitioners will therefore first discuss the application of the Norris-LaGuardia Act and the question of whether or not the present dispute concerns the internal economy of a foreign vessel. Respondents' counsel observes: "If an American corporation were in the place of respondents there would still be no labor dispute in this case, because the employment is aboard a foreign flag vessel only transiently in our waters on an international voyage" (Respondents' Brief 14). Respondents' counsel makes the following further observation without citation of authority: "Contrary to petitioners' repeated (Pet. Br. 17, 23) but unsupported statement, an American shipowner could obtain an injunction under the facts of this record if it stood in the place of respondents" (Respondents' Brief 49, 50).

Respondents' brief says that "There (in *Benz*) as here the American unions were picketing for the purpose of forcing a change in those articles and the re-employment of the foreign crew on terms and conditions comparable to those on American flag vessels" (Respondents' Brief 34-35); that application of the Norris-LaGuardia Act to the present dispute would constitute an "extension of our labor laws to foreign flag vessels" (Respondents' Brief 36); that the present dispute involves "internal economies of foreign vessels" (Respondents' Brief 36-37); that "Petitioners would force a change in that contract" (Respondents' Brief 38); that the dispute herein is one "involving employment aboard foreign ships or in foreign commerce generally" (Respondents' Brief 39); that application of the Norris-LaGuardia Act to the present dispute would "make the Act applicable to disputes over conditions of employment aboard a foreign flag vessel" (Respondents Brief 42).

The contention, therefore, is that the nature of the dispute between the parties is decisive. However, there is no

claim that the picketing union was seeking to represent the foreign crew or to bargain on their behalf or to seek any change in the internal affairs of the *S.S. Nikolos*. (R. 14, 28, Respondents' Brief 6.)

This court in *Benz*[1] based its decision on the fact that the dispute there was "between nationals of other countries operating ships under foreign laws;" (353 U.S. 143), the dispute "arose on a foreign vessel" and was "between a foreign employer and a foreign crew * * *" (353 U.S. 142). The unions in the *Benz* case picketed on behalf of the members of the crew of the *S.S. Riviera* in an effort to reach a satisfactory adjustment of a dispute between the crew and the foreign employer.

In our case the Marine Cooks & Stewards Union picketed on behalf of its own members whose economic interests were injured by the entry of the *S.S. Nikolos* into the salt trade between Mexico and Tacoma, Washington. The trial court found:

"XVI

Plaintiffs or some of them have entered into and are seeking other contracts of affreightment covering the carriage of like cargoes from Mexican ports to United States ports in the Puget Sound area and to Hooker Electrochemical dock in Tacoma aboard the *S.S. Nikolos* and/or other similarly registered and manned vessels, owned, operated or chartered by plaintiffs, or some of them" (R. 35)

"XXIV

As a result of the engagement in this trade by the plaintiffs in vessels of foreign registry; vessels of American registry and operated and manned under

1. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

> contracts with the defendant unions have lost or will lose such business with resultant loss of employment to members of defendant labor organizations." (R. 36-7)

The picketing protested the economic invasion of the *Nikolos* and the petitioners in picketing were not seeking to change wages, hours or working conditions on the *S.S. Nikolos* (R. 25-28; R. 75). The picket sign carried first said only "Picket Boat" (R. 59) and then a new sign was used stating "AFL-CIO Seamen Protest Loss of Their Livelihood to Foreign Flag Ships with Substandard Wages or Substandard Conditions" (R. 60).

Respondents point to no decision holding that peaceful picketing of a foreign vessel constitutes interference with the internal order or economy of the vessel. The dispute between the parties here does not concern any claimed interference by the petitioning labor union with relations between the master and the crew or with respect to any matter involving the internal discipline of the ship. The dispute involved a clash of economic interests between the petitioners and the respondents. Petitioners by their peaceful picketing gave publicity to the effect of respondents' conduct upon the members of petitioner who protested "loss of their livelihood." By their peaceful picketing petitioners asked those in sympathy with their cause not to assist the respondents in their efforts to establish a foreign ship employing a foreign crew in a trade formerly employing an American ship and petitioners' members. The trial court observed (R. 119):

> "The resentment of the defendants and their members at what they regard as unfair competition, as it were, and their efforts to remove it, are quite understandable and certainly not without strongly sympathetic points."

Nor does the present dispute involve interference with the "internal economy" of the *Nikolos* as that phrase has been judicially construed.

The Consular Treaty with Liberia provides some guidance as to what is meant by the internal order or economy of foreign vessels. It provides:

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws." Convention Respecting Consular Officers with Liberia, October 7, 1938, Art. X, part 4, 54 Stat. 1751, T.S. No. 957.

In *Wildenhus's Case*[1], this court had occasion to consider the reasons for not interfering with the internal economy of a foreign vessel. This court said:

> "It was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local govern-

1. *Wildenhus's Case*, 120 U.S. 1, 12 (1887).

ment to be dealt with by the authorities of the nation to which the vessel belonged . . ."

Wildenhus's Case, 120 U.S. 1, 12 (1887) (dictum);
Cunard Steamship Co. v. Mellon, 262 U.S. 100, 122 et seq.;
U.S. v. Flores, 289 U.S. 137, 158.

Controversies as thus defined seem limited to matters between the captain and the crew, minor crimes on ship board, suits by seamen, wage claims and the like. *The Flag of Convenience Fleet*, 69 Yale L.J. 499, 504-513 (January 1960). The present dispute does not involve the wages, hours or conditions of the S.S. *Nikolos* except as conditions which existed when the respondent Seatankers, Inc., chartered the S.S. *Nikolos* from respondent Panama Steamship Company.

The present dispute involves the vessel, her owners, her operators and charterers, but petitioners did not interfere nor seek to interfere in any way with the internal economy of the vessel. There is no need, therefore, to decide whether or not the Norris-LaGuardia Act would apply if the dispute here did involve interference with the internal economy of the S.S. *Nikolos*. That problem existed in the *Benz* case but does not exist here.

The Liberian Treaty requires no contrary result. That Treaty (p. 8 of this brief) provides that Liberian vessels shall "in all respects, and unconditionally be accorded the *same* treatment as" vessels of the United States. Since all American flag ships and their American owners are subject to the American law, this article does not bar application of the Norris-LaGuardia Act to the present dispute. If anything the treaty might be interpreted to grant the *same* remedies to Liberians as are granted to Americans, including the right to file charges under the Taft-Hartley Act for unlawful conduct.

We pointed out in our opening brief that the present dispute falls within the definition of a labor dispute, as this court has interpreted that term in the Norris-LaGuardia Act (Petitioners' Brief 10 to 24). We respectfully refer this court to that discussion, and particularly to *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91 discussed on pages 14 and 15; and to *Aetna Freight Line, Inc. v. Clayton*, 228 Fed. (2d) 384; cert denied (1956), 351 U.S. 950.

PETITIONERS BY PEACEFULLY PICKETING COMMITTED NO TORT IN VIOLATION OF THE TREATY WITH LIBERIA

Respondents on pages 2 and 3 of their brief quote in part the treaty between the United States and Liberia. The following additional paragraphs of that treaty are relevant:

"Article I

. . . . . .

The Nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The Nationals of each High Contracting Party shall receive within the territory of the other, upon submitting to conditions imposed upon its Nationals, the most constant protection and security for their persons and property and shall enjoy in this respect that degree of inspection that is required by national law." (54 Stat. 1740)

. . . . . .

"Article XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within

> the territorial waters and harbors of the other party, in all respects and unconditionally be accorded the same treatment as the vessels and cargoes of that party." (54 Stat. 1746).

In Article I it is agreed that Liberian Nationals be granted freedom of access to the courts of the United States "on conforming to the local laws" and in Article XIV that Liberian Nationals are entitled to protection and security for their persons and property "upon submitting to conditions imposed upon" American Nationals. The treaty therefore does no more than promise equality of treatment for Liberian Nationals and owners of Liberian ships who enter American ports.

There is no allegation in the complaint nor any finding by the lower courts that any act of petitioners violated the Liberian Treaty. The respondents' brief does not point to any evidence or finding that petitioners' conduct violated the Liberian Treaty. The argument seems to be that application of the Norris-LaGuardia Act would result in respondents being unable to secure an injunction and therefore application of the Norris-LaGuardia Act to this labor dispute between Liberian corporations and an American union will violate the Liberian Treaty.

The treaty in essence forbids governmental action which is discriminatory against foreign shipping but does not guarantee that foreign ships are entitled to come into American ports without any interference from American citizens, or on more favorable terms than are afforded American ships. Foreign shipowners must take American law (including limitations on the jurisdiction of American courts) as they find it, and as it applies to American shipowners.

THE UNITED STATES DISTRICT COURTS LACK JURISDICTION TO GRANT AN INJUNCTION FOR AN ALLEGED MARITIME TORT WHETHER THE ACTION BE ON THE LAW SIDE OR THE ADMIRALTY SIDE.

Respondents argue that the present complaint to enjoin an alleged maritime tort must be allowed either as an action on the law side under 28 U.S.C. Sec. 1331, or on the admiralty side. If the action is on the law side respondents must distinguish this court's decision in *Romero v. International Terminal Operating Co.*, 358 U.S. 354; If on the admiralty side, respondents ask this court to overrule the long-established rule that admiralty does not exercise equitable jurisdiction.

In our main brief, we deal at some length with this point (Petitioners' Opening Brief, pages 24-27). In their reply respondents argue that the *Romero* decision could not be intended to apply to bar the present complaint for an injunction because, if applicable, respondents are left with only a claim for damages. What respondents argue is that any claim for a maritime tort may be the basis for an injunction proceeding on the law side because an admiralty court without the injunctive remedy is inadequate to deal with the task of protecting maritime rights rooted in federal law.

To support their claim that admiralty courts may grant injunctions, respondents rely upon *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950). That case carefully distinguishes between an independent equitable claim pertaining to maritime property and a clearly maritime claim in which incidental equitable relief is sought. The court states that the denial of any equitable relief would be proper if the libelants in the *Swift & Co.* case had gone into admiralty by way of a creditor's bill to set aside the sale of a ship as a fraudulent transfer (339 U.S. 690 n).

The court notes that admiralty "cannot entertain a suit to reform a release from liability executed under a mutual mistake merely because it pertains to a maritime claim; * * *". (339 U.S. 692) The court likewise noted that admiralty will not entertain a suit for an accounting as such but when a cause of action over which admiralty has independent jurisdiction is before the court, an accounting may be ordered if necessary to the complete adjustment of the rights over which admiralty has jurisdiction (339 U.S. 692-3). The court says (page 693):

> "In each of these cases a holding that admiralty must stay its hands as to a matter intrinsically non-maritime but necessary to the complete adjustment of rights over which admiralty has independent jurisdiction would have seriously impaired the discharge by admiralty of the task which belongs to it."

The present proceeding is an independent equitable proceeding in which plaintiffs seek an injunction as the principal element of their prayer for relief. The respondents seek an injunction and ask for damages in addition. The main thrust of the complaint is in equity.

The statements of this court and the statements in the admiralty treatises referred to on pages 21 and 22 of respondents' brief are clear and unequivocal. Except in limitation of liability proceedings, admiralty courts do not issue injunctions.

Nor is there any need to seek a loophole through *Romero* in order to overcome indirectly the rule that admiralty courts do not issue injunctions. If a federal district court on the law side had jurisdiction to issue an injunction forbidding an alleged maritime tort, there would be no need for this court to have referred to the lack of power of the admiralty court to issue injunctions. If action for an in-

junction could be brought on the law side on the maritime tort, the same result could be accomplished as though admiralty could grant an injunction.

CONCLUSION

For the reasons stated in our opening brief and in this reply it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the District Court with instructions to vacate the temporary injunction and dismiss the action.

Respectfully submitted,

JOHN PAUL JENNINGS
J. DUANE VANCE
Counsel for Petitioners

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